84-1655

No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MARY P. LAFFEY, *et al.*,
Petitioners,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in computing a fee award under the civil rights statutes, when a district court finds that the rates plaintiffs' attorneys regularly charge their fee-paying clients do not reflect the skill, experience and reputation of the attorneys but rather the nature of the non-profit clientele they have chosen to represent, the court must nevertheless award fees based on those rates rather than on the prevailing market rates in the community for lawyers of comparable skill, experience and reputation.

2. If the answer to Question 1 is yes, whether, under the civil rights statutes, a district court may award an upward adjustment in the lodestar for superior quality of performance when the lodestar rates reflect the lower rates paid by plaintiffs' attorneys' regular non-profit clientele but the attorneys' actual performance in the case before the court is found to be at a level which would command higher rates in the prevailing market in the community.

3. Whether the civil rights statutes preclude a district court from awarding an upward adjustment to the lodestar for contingency, where the lodestar rates have been determined by reference to hourly rates for non-contingent work, and where plaintiffs' attorneys devoted many thousands of hours to the case with a 50% risk that plaintiffs would not prevail and thus that the attorneys would go uncompensated.

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MARY P. LAFFEY, *et al.*,
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NORTHWEST AIRLINES, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] pray that this Court issue a writ of certiorari to review the decision of the United States Court

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[1] Petitioners are the original 40 plaintiffs in this action, who were certified as the class representatives for the class of all female cabin attendants employed by Northwest Airlines, Inc. during the pertinent time period. In addition to Mary P. Laffey, the petitioners are: M. Louise Ayres, Diane B. Backovich, Nancy J. Bates, Goldie K. Chun, Rhea Dow, Beverly A. Emge, Susan F. Gerde, Mary Patricia Gleeson, Dona M. Hall, Viona S. Hamilton, Peggy M. Helme, Judie Jochimsen, Celestine Johnson, Katherine T. Keane, Suzanne P. Kress, Margaret J. Laffey, Abby Lanman, Shirley Linburgh, Barbara E. Manrow, Alice C. McCabe, Patricia McFarland, Mary C. Moxness, Myrna Lee Olson, Janet M. Pegg, Susan M. Pupera, Carol Raschke, Angelica H. Renner, Virginia Rose, Marygale Rosenberg, Rosemary M. Ruff, Mary Ann Schaak, Georgia Simpson, Alta Mae Smith, Iris Lynn Smith, Janet P. Smith, Jimene K. Smith, Elizabeth Stewart, Gayle Sturgis, and Connie Walker.

of Appeals for the District of Columbia Circuit in *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 572 F. Supp. 354, and is reprinted in the Appendix to this Petition at App. 76a-141a. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 746 F.2d 4, and is reprinted in the Appendix at App. 1a-73a.

JURISDICTION

Petitioners seek review of a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on September 28, 1984. A timely petition for rehearing was denied on November 21, 1984 (see App. 74a). On February 14, 1985, the Chief Justice signed an order extending the time for filing a petition for a writ of certiorari to and including April 20, 1985 (see App. 143a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides in pertinent part:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs . . . .

The Equal Pay Act of 1963, incorporated into the Fair Labor Standards Act as Section 6(d), 29 U.S.C. § 206(d), provides in pertinent part:

> (3) For purposes of administration and enforcement, any amounts owing to any employee which have been

withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides in pertinent part:

> Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages . . . . An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of this action.

STATEMENT OF THE CASE

The instant petition involves the calculation of attorneys' fees for the services of plaintiffs' counsel in successfully prosecuting this massive civil rights class action. Suit was filed in 1970, and the merits were finally resolved 15 years later, with this Court's denial of certiorari, on January 14, 1985, in *Northwest Airlines, Inc. v. Mary P. Laffey, et al.*, No. 84-825.

The suit was brought under Title VII and the Equal Pay Act on behalf of more than 3,300 female cabin attendants employed by Northwest Airlines, Inc. (hereinafter "Northwest"). The complaint asserted ten class-wide violations of Title VII, and four of the Equal Pay Act, collectively challenging (in the district court's words) "virtually every aspect of Defendant's employment practices" (App. 117a). After fifteen years—encompassing, *inter alia*, a lengthy trial, massive remedial

proceedings, three appeals to the court of appeals, and two efforts by Northwest to secure review by this Court —litigation of the merits culminated in a judgment described by the district court as follows (App. 85a):

> Plaintiffs prevailed on every one of fourteen claims of violation and, although not every remedy they sought was awarded, they prevailed on the vast majority of remedial issues and obtained some of the most comprehensive monetary and injunctive relief ever awarded in an employment discrimination case.

The monetary relief awarded to the class exceeds $57 million. As Northwest recently advised this Court, the judgment in the instant case "may be the largest judgment ever rendered under the Equal Pay Act or Title VII of the Civil Rights Act."[2] And the injunctive relief awarded is equally sweeping, requiring substantial salary increases for thousands of female employees and elimination of sex discrimination in a wide range of employment practices.

To this day, the attorneys who have prosecuted this case on plaintiffs' behalf have received no compensation for their services, nor have they been reimbursed for their massive outlays to finance the prosecution of this case. Moreover, throughout the entirety of that fifteen-year period—and until this Court's denial of certiorari on the merits earlier this year—plaintiffs' counsel faced the risk that plaintiffs ultimately might not prevail in this action in whole or in substantial part, and that counsel in consequence would go entirely, or largely, without compensation for their services.

Following the district court's entry of final judgment on the merits in November, 1982, plaintiffs filed an application for attorneys' fees, seeking compensation for more than 11,000 attorney hours devoted to the litigation of the merits up to that point. Plaintiffs' entitlement to a fee award against Northwest pursuant to § 706(k)

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[2] Petition for Writ of Certiorari in No. 84-825, pp. 2-3.

of Title VII and § 16(b) of the Fair Labor Standards Act (which is applicable in Equal Pay Act cases) was not disputed. What was disputed was the *amount* of the award to which plaintiffs are entitled. The instant petition for certiorari arises out of the disposition below of that question.[3]

1. *The Lodestar.* While the *number* of hours for which compensation was due was not seriously disputed—the district court determined that 11,236 "merits hours" were compensable (App. 101a),[4] and Northwest did not challenge that determination on appeal—the *rates* to be used in constructing the lodestar were the subject of a fundamental debate. Plaintiffs contended that the lodestar rates for their attorneys (all in the firm of Bredhoff & Kaiser) should be determined by reference to the prevailing rates in the District of Columbia for lawyers of comparable skill, experience and reputation. Northwest, noting that Bredhoff & Kaiser has chosen to concentrate its practice on the representation of working people and non-profit clients who pay rates substantially below those prevailing in the District of Columbia, contended that the "market" rates for Bredhoff & Kaiser attorneys (and accordingly the rates that should be used in determining the lodestar in this case) should be determined by what the firm's fee-paying clients pay. The district court rejected Northwest's contention and agreed with plaintiffs that the lodestar rates should be determined by the prevailing market rates in the community received by lawyers of comparable skill, experience and reputation for performing work similar to the work for which the fee award was sought (App. 103a-109a).

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[3] Plaintiffs' counsel have devoted additional hours subsequent to November, 1982, defending the district court's final judgment on appeal and overseeing Northwest's compliance with that judgment. A separate application for compensation for those additional services will be filed in the district court.

[4] The court also awarded fees for time spent litigating the amount of the fee award (App. 101a).

The district court predicated its determination of the lodestar rates upon the following findings, none of which had been disputed by NWA and each of which was abundantly supported by the record:

> —Defendant does not dispute the high quality of legal services rendered in this case; indeed, it acknowledges counsels' "prominence and ability" and concedes that Bredhoff & Kaiser is "one of the 'premier' employment discrimination firms in the country" [App. 103a].
>
> —Defendant also does not challenge Plaintiffs' proposed matrix [of lodestar rates] as an accurate depiction of the prevailing market rates for lawyers of comparable skill and ability who represent defendants in complex Title VII cases [App. 103a].[5]
>
> —Finally, Defendant acknowledges that the rates Plaintiffs' counsel charge fee-paying clients are not a function of the intrinsic value of the firm's legal services but rather of the particular clients the firm chooses to represent and their ability to pay [App. 103a].

On the basis of these findings, the district court adopted the matrix of lodestar rates proposed by plaintiffs: $75 per hour for lawyers in their first through third years of practice; $100 for years 4-7; $125 for years 8-10; $150 for years 11-19; and $175 for the 20th year and beyond (App. 102a, 109a-110a).[6]

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[5] The court's opinion also stated:

> The Court finds that the relevant legal market in this action is complex employment discrimination litigation and that this market is subject to the same hourly rates that prevail in other complex federal litigation. [App. 108a; see also App. 109a].

[6] Because the suit spanned so long a period, the court fractionated the computation for each attorney, applying the matrix of rates to each year's service on the basis of the attorney's experience as of that year. For example, the rate for Michael Gottesman (plaintiffs' senior counsel) was $150 for hours prior to 1978 (his 20th year) and $175 thereafter. See App. 102a, n.31; 110a.

The court of appeals, in a divided opinion, ruled that the district court erred when it determined the lodestar rates by reference to prevailing rates in the community, and directed instead that the lodestar rates must be determined by reference to the rates charged by Bredhoff & Kaiser to its fee-paying clients (App. 18a-42a). In arriving at that result, the court below did not disturb any of the district court's findings. Nor did the court overlook this Court's holding in *Blum v. Stenson*, —— U.S. ——, 104 S. Ct. 1541 (1984), that the lodestar rates for salaried attorneys employed by non-profit organizations are to be determined by reference to prevailing rates in the community. Rather, the court below understood the holding in *Blum* to have resulted only "because the attorneys involved had no regular billing rates [so that] the court was required to set a hypothetical rate where none otherwise existed" (App. 26a). The court below concluded, however, that the approach to fee-setting adopted in *Blum*—which it variously characterized as "an essentially impossible task" (App. 28a), "a largely arbitrary divination" (App. 29a), "a charade" (App. at 30a), "[g]arbage in, garbage out" (App. 30a, n.99), and "whimsical and capricious" (App. 32a)—is not necessary in the case of attorneys who actually collect fees from some of their clients. And if those attorneys have elected a practice of representing less affluent fee-paying clients—and thereby have demonstrated their willingness to work at the rates those clients are able to pay—it would be a "windfall" to award them fees in a civil rights case at the same levels as would be awarded if the case had been handled by equally competent attorneys whose practice otherwise consisted of representing more affluent clients at higher rates (App. 22a-23a). The court stated that holding attorneys to their own rates spares the courts the burden of determining the prevailing rates in the community for lawyers of comparable skill, experience and reputation (App. 28a-40a)—a burden that must be "tolerated"

in the case of salaried attorneys only because it is "unavoidable" (App. 40a).

Judge Wright, dissenting, reasoned that the denial of prevailing rates to plaintiffs' counsel was inconsistent with this Court's holding in *Blum* and with the "unambiguous intent of Congress" as reflected in the legislative history recounted in *Blum* (App. 56a-65a).

2. *Quality Adjustment.* Plaintiffs had sought an upward adjustment in the lodestar to account for what they alleged was the exceptional quality of their representation. The district court denied such an adjustment for the following reason (App. 113a-114a):

> Plaintiffs' counsel . . . are extremely experienced, extraordinarily capable attorneys who provided Plaintiffs with legal representation of the highest caliber. For these reasons, Plaintiffs requested and have been awarded compensation at hourly rates commensurate with the most experienced, highly respected, and capable attorneys in the District of Columbia. And for *that* reason, no additional increase to compensate for the quality of counsels' performance is warranted.
>
> Plaintiffs' counsel clearly performed with distinction, but that is no more than the Court or Plaintiffs would demand of counsel earning up to $175 per hour. Counsels' legal acumen and impressive performance in this case . . . are fully accounted for in the lodestar rates. [Emphasis in original].

When Northwest appealed challenging, *inter alia*, the lodestar rates awarded, plaintiffs cross-appealed, contending that if the lodestar rates were reduced on appeal plaintiffs were entitled to a remand for reconsideration by the district court of the propriety of a quality adjustment in light of the lower lodestar rates. The court of appeals, although reducing the lodestar rates, denied the remand requested by plaintiffs. Its full explanation was as follows (App. 41a-42a, n.128):

> Laffey cross-appeals, seeking to have the issue of enhancement of the lodestar remanded if the hourly rates are reduced. In *Blum* the Supreme Court held that an upward adjustment for quality may be justified "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' " [104 S. Ct.] at 1549. In this case, there simply was no specific evidence that plaintiffs' counsel provided services that were "superior" to those services provided at the firm's normal rates. In addition, the trial judge expressly found that "[t]he case . . . simply was not 'exceptional' as that term has been defined by the Court of Appeals." *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 377 (D.D.C. 1983). Therefore, *the district judge has already found* that under the controlling law established by *Blum* plaintiffs' counsel do not qualify for a "quality" multiplier. [Emphasis in original].

3. *Contingency Adjustment.* Because the rates used in the lodestar are those charged by lawyers who are promised payment of their fees regardless of whether they prevail [7]—and because "[w]hen Plaintiffs' counsel agreed to undertake this lawsuit . . . they did so with the understanding that they would not be compensated for their labor unless they ultimately prevailed on the merits" (App. 117a)—plaintiffs contended that the lodestar alone (i.e., hours times lodestar rate) did not reflect what lawyers would have charged in the marketplace to undertake this litigation on a contingent basis, and thus did not constitute an appropriate fee award

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[7] This is true both of the matrix of prevailing community rates that the district court approved for the lodestar (App. 115a, n.43) and of Bredhoff & Kaiser's own rates to fee-paying clients that the court of appeals ordered be used in constructing the lodestar.

under the civil rights fee-shifting statutes. Plaintiffs accordingly sought an upward adjustment for contingency.

The district court awarded such an adjustment. The court began (App. 115a):

> Where a prevailing plaintiff's counsel litigates Title VII claims on the understanding that it will receive no significant remuneration unless the lawsuit is successful, an upward adjustment in the lodestar is appropriate "to compensate for the risk that the lawsuit would be unsuccessful and that no fee at all would be obtained" [quoting *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980) (*en banc*)].

The court reasoned: "Lodestar adjustments are not 'bonuses' or 'rewards' in excess of an attorney's deserved compensation, but are an 'attempt to calculate more precisely the market value of the services provided by the attorney'" (App. 112a, quoting *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 6 n.28 (D.C. Cir. 1982)).

"[T]he lodestar calculation here does not account for the risk of not prevailing" (App. 115a, n.43). The district court accordingly turned to an assessment, viewed as of the outset of the litigation (App. 115a-116a) (when plaintiffs' counsel had to decide whether to undertake the litigation) of "the 'actual probability' that the fee applicant would have lost the case and recovered no fee" (App. 116a, quoting *Donnell v. United States*, 682 F.2d 240, 254 n.43 (D.C. Cir. 1982)). The court had before it extensive documentation by plaintiffs' counsel particularizing the nature of the risk they had assumed (App. 94a, 117a). The court concluded that "Plaintiffs' likelihood of success was approximately 50%" (App. 119a). That assessment was predicated upon the following findings:

> —[T]he alleged statutory violations touched virtually every aspect of Defendant's employment practices and raised a multitude of legal and factual issues; and the outcome of these issues was far from preordained [App. 117a].

> —No prior government or private proceeding had suggested Defendant's liability or had even developed the facts of the case; Plaintiffs' counsel had to conduct their own extensive investigation and discovery, and they simply could not know at the outset of their representation how the critical facts would develop [App. 117a, footnote omitted].
>
> —[T]he case was brought at an early stage in the development of the law under Title VII and the Equal Pay Act. There were few significant legal precedents interpreting either of the statutes and none from the United States Supreme Court. Thus, Plaintiffs' counsel could not know or reliably predict what the controlling standards would be [App. 118a, footnote omitted].
>
> —Finally, Plaintiffs knew they were facing a large, well-financed corporate defendant with a policy and history of tenaciously defending cases brought against it. This fact, combined with the unsettled state of the law, presaged a protracted battle in both the trial and appellate courts. And Plaintiffs' counsel knew at the outset that the battle would be waged on Defendant's behalf by extremely capable counsel. . . . [App. 118a].

On the basis of its finding that Plaintiffs' likelihood of success at the outset was approximately 50%, and "factor[ing] into the calculus the magnitude of the undertaking and, consequently, the number of hours counsel placed at risk" (App. 119a-120a),[8] the court concluded that "Plaintiffs are fully deserving of [a] 100% contingency adjustment" (App. 120a).

A divided court of appeals reversed, holding that "no risk enhancement should be awarded" in this case (App.

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[8] The court found:

> [Plaintiffs' counsel] had every reason to anticipate [at the time they undertook this case] that the case would require a substantial investment (both in time and out-of-pocket expenditures) over an extended period [App. 117a, footnote omitted].

51a). Expressing doubt whether contingency adjustments are *ever* appropriate in fee-shifting cases (App. 46a-47a, n.138, 49a, 50a), the court understood this Court to have held in *Blum v. Stenson*, *supra*, that at most they are allowable only in "exceptional" cases (App. 50a, see also App. 49a).[9] And, the court concluded, this is not such a case (App. 50a-51a):

> Whatever the Supreme Court meant by the term "exceptional," this case does not fall within its embrace. The district court found that the plaintiffs' initial chance of success was 50 percent. *That chance of winning reflects the norm for litigated cases*—in the average case, one side will win, one will lose. *The level of risk was not unusual.* Since this case did not present an exceptional level of risk, no risk enhancement should be awarded. [Emphasis in original; footnote omitted].

The court below also made clear that it would be improper to award a contingency adjustment in any case in which the risk of not prevailing *exceeded* 50%, for then "[t]he award would be greatest when the losing party was most unreasonable [sic] in litigating its case, creating a perverse penalty for those least culpable," and "the net effect . . . would be to make a marginal case as attractive to bring as a very strong case" (App. 45a, footnote omitted). The court did not indicate, in the light of these rulings, what type of case *could* qualify as an "exceptional" case permitting a contingency adjustment.

Judge Wright, in dissent, disagreed that this Court in *Blum* had decided *any* issue respecting contingency adjustments, let alone that they could be awarded only in

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[9] The court below expressed its view that contingency adjustments should *never* be awarded, because they in effect compensate attorneys for the time spent in other statutory fee cases in which they do not prevail, and thus contravene the principle established in *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983), that attorneys are not to be compensated in such cases for unsuccessful claims (App. 46a-47a).

exceptional cases (App. 70a), and believed that the district court's award of such an adjustment in this case should be affirmed (App. 69a). Noting that at least two of the decisions cited in the legislative history "as applying the appropriate standard" had "adjusted the award to account for the risks incurred by the attorney" (App. 71a, n.18), Judge Wright reasoned (App. 71a-72a):

> Congress made a deliberate judgment to encourage litigants to press claims for violation of civil rights even where the chances of success are uncertain. The legislative decision to permit courts to make adjustments to compensate for the risk of not prevailing reflects the "experience of the marketplace that lawyers generally will not provide legal representation unless they receive a premium for taking that risk." Berger, *Court Awarded Attorney Fees: What is Reasonable?*, 126 U. Pa. L. Rev. 281, 325 (1977). No doubt, Congress did not intend to encourage suits even where the prospects of success are extremely remote. But where, as here, the probabilities approached 50 percent, adjusting the lodestar to account for the prospect of large, uncompensated outlays of time and money is entirely consistent with —indeed, mandated by—the congressional design. [Footnotes omitted].

A timely petition for rehearing was denied by the panel (App. 74a), and a suggestion of rehearing *en banc* was denied with three judges indicating that they had voted for rehearing and two others not participating (App. 75a).

REASONS FOR GRANTING THE WRIT

The decision below poses three important and recurring issues respecting the standards for awards of attorneys' fees in federal civil rights cases. Each issue merits plenary consideration by the Court.

First, the court of appeals ruled that this Court's holding in *Blum*—that salaried lawyers employed by nonprofit

organizations are entitled to fee awards in civil rights cases based on the prevailing market rates in the community for lawyers of comparable skill, experience and reputation—does not apply to lawyers in private practice whose rates to fee-paying clients in other cases are, because of the nature of the lawyers' chosen clientele, lower than the prevailing market rates for lawyers of comparable skill, experience, and reputation. That ruling is inconsistent with the statutory interpretation announced in *Blum*, with the applicable legislative history, and with the decisions of other Circuits.

Second, the court of appeals held that a district court may not award an upward adjustment in the lodestar rates based on quality to lawyers who are found to have performed at a level superior to that expected of lawyers who charge at the level of the lodestar rates. That ruling is inconsistent with the standards for quality adjustments set forth in *Blum*.

Third, the court below held that plaintiffs' lawyers in a civil rights class action, who have devoted thousands of hours to a case with a 50% risk that the plaintiffs would not prevail and thus that the lawyers would go uncompensated, cannot be awarded an upward adjustment of the lodestar rates based on risk, even though the lodestar rates have been determined by reference to hourly rates for non-contingent work. That ruling addresses a question expressly left open in *Blum*, is inconsistent with the applicable legislative history, and is in conflict with the decisions of ten Circuits. (One other Circuit has reached the same result as the court below on this issue.)

This case has been closely watched by practitioners with an interest in civil rights litigation. Under the standards set down by the court below, it would be economically irrational for lawyers to take on the representation of plaintiffs in large civil rights class actions—a result directly contrary to Congress' objective in providing for awards of attorneys' fees in such cases. A decision of that consequence should not go unreviewed.

1. *The Lodestar Rates.* The court of appeals ruled that the district court erred in determining the lodestar rates for plaintiffs' attorneys by reference to the prevailing rates in the community for lawyers of comparable skill, experience and reputation, and instead was required to look to the rates charged by plaintiffs' attorneys to other clients, even though those rates were found to reflect the nature of the clientele and not the market value of the attorneys' services. That ruling is inconsistent with the rationale of this Court's decision in *Blum v. Stenson*, —— U.S. ——, 104 S. Ct. 1541 (1984), and with the legislative history on which the decision in *Blum* was premised. Moreover, the ruling directly conflicts with two decisions of the Ninth Circuit, and also conflicts with general principles announced in decisions in a number of other Circuits.

In *Blum*, this Court ruled that Congress intended the lodestar rates in civil rights fee awards to non-profit legal services organizations to be calculated according to the prevailing market rates "in the community for similar services by lawyers of reasonably comparable skill, experience and reputation" (104 S. Ct. at 1547 n.11)—precisely the standard for determining the lodestar rates employed by the district court in the instant case. The court of appeals attempted to confine the reach of *Blum* to cases where the fee applicants are salaried employees of non-profit organizations, stating that in such cases an inquiry into prevailing market rates is required because the lawyers involved have no established billing rate. In other cases, according to the court of appeals, a lawyer's billing rates, rather than the prevailing market rates, should control, even where, as here, it is established that the lawyer's billing rates do not reflect the market value of his services.[10]

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[10] It is, of course, true that in many cases—perhaps most—the billing rates of a private, for-profit lawyer are an accurate reflection of, indeed are a direct function of, the prevailing market value of that lawyer's services. In such cases, a lawyer's own billing rates should be congruent with the prevailing rates in the community

The court of appeals' attempted limitation of *Blum* cannot be reconciled with either the language or the rationale of *Blum*. Thus, the *Blum* Court concluded:

> It is . . . clear from the legislative history that Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization.
>
> • • • •
>
> The statute and legislative history establish that "reasonable fees" . . . are to the calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. [104 S. Ct. at 1547; footnote omitted].

See also *id.* at 1550 n.18 ("we decline[] to draw a distinction with respect to the use of market rates between profit and nonprofit law offices"). And, the Court predicated those conclusions on an analysis of legislative history making clear that Congress intended a single standard—the prevailing rate in the community for lawyers of comparable skill, experience and reputation—to govern the calculation of fee awards in civil rights cases regardless of the fee applicants' type of practice. *Id.* at 1547-48.

Moreover, the very reasons offered by the court of appeals for applying a different standard in the instant case were explicitly rejected by the Court in *Blum*. The court of appeals suggested that use of the prevailing community rates standard here would result in rates exceeding

---

and accordingly should be highly informative of his lodestar rates. But where, as has been found as fact here, a lawyer's established billing rates are a function of such non-economic factors as the choice to represent a particular clientele that cannot afford to pay prevailing market rates, that lawyer's billing rates do not reflect the value of his services on the open market. In such cases, a lawyer's own billing rates no more reflect the prevailing market rate in the community than do the salaries of lawyers employed by non-profit legal service organizations.

the amount necessary to induce these particular attorneys to undertake civil rights cases, would confer a "windfall" upon the fee applicants, and would be difficult to calculate. The Court in *Blum* addressed and rejected each of these asserted reasons not to apply the prevailing market rate standard. The Court in *Blum* affirmed an award based on "prevailing market rates" to salaried employees of a non-profit organization, despite the argument of the defendant and the Solicitor General that such rates were "unnecessary to attract non-profit counsel" and would "confer an unjustified windfall." 104 S. Ct. at 1546. The *Blum* Court explained that the legislative history unmistakably established that Congress intended fee awards to *all* lawyers to be "calculated according to prevailing market rates," and that rates computed in that manner are not a "windfall." *Id.* at 1546-47. While such rates may be "unnecessary" to attract lawyers whose career choices demonstrate a willingness to work for less, that "policy argument" cannot justify departing from the choice Congress made. *Id.* Finally, the Court in *Blum* "recognize[d] . . . that determining an appropriate 'market rate' for the services of a lawyer is inherently difficult." *Id.* at 1547, n.11. "Nevertheless," the Court concluded, that is "the critical inquiry in determining reasonableness." *Id.*

The services that a lawyer representing plaintiffs in a civil rights action is called upon to perform are the same whether that lawyer is otherwise a corporate lawyer, a tax lawyer, a union lawyer, or a civil rights lawyer. But, under the court of appeals' approach, the fee award in such a case becomes a function not of the lawyer's skill, experience, and reputation, but of the type of practice he has chosen to follow or of the type of clients he has chosen to represent in cases *other* than the one before the court. For example, suppose a given lawyer who is highly skilled and experienced chooses at one point in his career between three separate opportunities then available to him. The first is at a for-profit corporate

law firm; the second is at a for-profit firm that represents indigent clients at reduced rates; and the third is at a non-profit organization that would employ him on a salaried basis. According to the court of appeals, should that lawyer subsequently represent the prevailing party in a civil rights case his fee award would depend on which job he had chosen: as a corporate lawyer, he would be entitled to a lodestar rate based on his normal billing rate which should in fact accurately reflect the market value of his services (see note 10, *supra*); as a salaried lawyer, he would be entitled to the same lodestar rate he would have received as a corporate lawyer, because that rate would accurately reflect the value on the open market of the services of a lawyer of his skill, experience and reputation; but as a for-profit lawyer representing indigent clients, he would be entitled only to a lodestar rate at the lower level his indigent clients were able to pay. Though the market value of his services in the civil rights case, based on skill, experience and reputation would be the same no matter which career path he had chosen, it would, according to the court of appeals, be a "windfall" to award him that market value if he chose as his general career a private practice representing indigent clients. It is unlikely that the Congress that enacted the various civil rights statutes intended such a result.[11]

The court of appeals' ruling on this issue is in direct conflict with two decisions of the Ninth Circuit: *Manhart v. City of Los Angeles Dept. of Water*, 652 F.2d 904, 909

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[11] As the dissent in the court below pointed out, the instant case exemplifies the anomaly of the holding below:

> In *Blum v. Stenson*, 104 S. Ct. 1541, 1544 n.4 (1984), the Supreme Court upheld a reasonable hourly rate of $105 per hour to a Legal Aid lawyer with one and a half years of litigating experience. This amount appears to exceed the average fee for Bredhoff & Kaiser *partners* with vastly more extensive experience. . . . Congress did not intend such an incongruous result. [App. 59a, n.4; emphasis in original].

(9th Cir. 1981), *vacated and remanded on other grounds*, 461 U.S. 951 (1983) (private attorneys representing labor unions entitled to fees based on prevailing market rates, not on the rate charged the union); and *White v. City of Richmond*, 713 F.2d 458, 461 (9th Cir. 1983) (private, for-profit attorneys not required to submit evidence of their "customary hourly rate" because "many civil rights practitioners do not bill their clients at an hourly commercial rate"). See also, *Strama v. Peterson*, 561 F. Supp. 997, 998-99 (N.D. Ill. 1983). The Court's ruling also conflicts with general principles announced in decisions of a number of other Circuits. See, *e.g.*, *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) ("If the lawyer seeking the fee is in private practice, his or her customary rate would be a relevant but not conclusive factor"); *Henry v. Webermeier*, 738 F.2d 188, 193 (7th Cir. 1984); *Neely v. City of Grenada*, 624 F.2d 547, 549-551 (5th Cir. 1980).

2. *Quality Adjustment.* In *Blum*, this Court stated the following standard for determining whether "quality of representation" may justify an upward adjustment in the lodestar rates:

> The "quality of representation" . . . generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional." [104 S. Ct. at 1549].

The district court denied a quality adjustment, even though it had found that "[p]laintiffs' counsel . . . are extremely experienced, extraordinarily capable attorneys who provided Plaintiffs with legal representation of the highest caliber," precisely because it had "awarded [plaintiffs' counsel] compensation at hourly rates commensurate with the most experienced, highly respected, and capable attorneys in the District of Columbia" (App.

113a-114a). "[F]or *that* reason, no additional increase to compensate for the quality of counsels' performance is warranted" (App. 114a, emphasis in original). As has already been discussed, the court of appeals rejected the lodestar rates adopted by the district court and ruled that the lodestar must be based upon the lower rates customarily charged by plaintiffs' counsel to their fee-paying clients.

Given the findings of the district court respecting the quality of plaintiffs' counsel's performance, the court of appeals' ruling on the lodestar rates leaves precisely the situation in which the *Blum* Court stated a quality adjustment may be appropriate: "the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and . . . the success was 'exceptional'." [12] The court of appeals' rejection of plaintiffs' cross-appeal on this point—on the ground that "there simply was no specific evidence that plaintiffs' counsel provided services that were 'superior' to those services provided at the firm's normal rates" (App. 42a, n.128)—conflicts with the standard set forth in *Blum*.[13]

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[12] *Blum* stated that quality adjustments will be appropriate "only in the rare case." 104 S. Ct. at 1549. That is because, as we have shown in part 1, *Blum* held that the *lodestar rate* is to be set at a level that reflects the skill, experience and reputation of the attorney. On that assumption as to the lodestar rate, a quality adjustment would be warranted only in the rare case in which an attorney's performance was so exceptional that it *exceeded* what is to be expected of an attorney of his own skill, experience and reputation. But if the court below is right that some attorneys are to receive lodestar rates *below* those reflecting their skill, experience and reputation because of the nature of their clientele, the teaching of *Blum* is that such attorneys are eligible for a quality adjustment.

[13] As discussed in text, the district court found that a quality multiplier would not be appropriate given the lodestar rates *it* awarded. Having rejected those lodestar rates in favor of lower rates, the court of appeals' statement that the district court has already ruled on this issue (App. 42a, n.128) is disingenuous.

And the statement of the court below that this is not a case in which the success was exceptional likewise is not faithful to this Court's holding in *Blum*, given the results obtained in this case (*supra*, p. 4).[14]

3. *Contingency Adjustment.* Plaintiffs' counsel invested massive time and resources in this case, knowing that there was a 50% chance that the plaintiffs would not ultimately prevail and that in that event plaintiffs' counsel would go wholly uncompensated. The lodestar rates mandated by the court of appeals—as well as the lodestar rates adopted by the district court—are based on rates for non-contingent cases and do not account at all for the risk of non-success inherent in this contingent fee context. The court of appeals ruled, nonetheless, that in these circumstances the district court was without discretion to award any upward adjustment in the lodestar rates to account for the risk undertaken by plaintiffs' counsel.[15]

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[14] The court below purported merely to be accepting the district court's determination that this "case" was not "exceptional" (App. 42a, n.128). But what the district court had said was that the results were not exceptional given the "caliber of representation" expected from those commanding the lodestar rates the district court had awarded (App. 114a-115a). The district court nowhere intimated that it would have thought the results not "exceptional" given the "caliber of representation" that would be expected from lawyers commanding the lower lodestar rates mandated by the court of appeals.

[15] In so ruling, the court of appeals effectively held that a risk adjustment is never appropriate. While the court stated that in some "exceptional" cases an adjustment for risk might be appropriate (App. 50a), the court's analysis leaves no room for such a case. The court ruled that a 50% chance of success is not "exceptional" (App. 50a-51a), and that a smaller chance of success should not be rewarded (App. 45a-46a); and, *a fortiori*, because a better than 50% chance is even less risky than a 50% chance, that situation too would not qualify. Moreover, given its denial of an adjustment on the facts of this case, the court necessarily rejected "the magnitude of what was placed at risk" (App. 48a) as a factor justifying a risk adjustment.

This Court in *Blum* expressly left open the question whether an upward adjustment for risk may be awarded under the attorneys' fees provisions of the federal civil rights statutes:

> We have no occasion in this case to consider whether the risk of not being the prevailing party in a § 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment. [104 S. Ct. at 1550, n.17].

Four members of this Court have stated a view on this issue that is inconsistent with the decision of the court below. In *Hensley v. Eckerhart*, 461 U.S. 424, 448-49 (1983), Justice Brennan, concurring in part and dissenting in part, joined by Justices Marshall, Blackmun and Stevens, wrote as follows:

> [O]n many occasions awarding counsel fees that reflect the full market value of their time will require paying more than their customary hourly rates. Most attorneys paid an hourly rate expect to be paid promptly and without regard to success or failure. Customary rates reflect those expectations. Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate. The difference, however, reflects the time-value of money and the risk of nonrecovery usually borne by clients in cases where lawyers are paid an hourly rate. Courts applying § 1988 must also take account of the time-value of money and the fact that attorneys can never be 100% certain they will win even the best case.
>
> Therefore, district courts should not end their fee inquiries when they have multiplied a customary hourly rate times the reasonable number of hours expended, and then checked the product against the

> results obtained. They should also consider both delays in payment and the pre-litigation likelihood that the claims which did in fact prevail would prevail. . . . These factors are potentially relevant in every case. . . . [N]o fee is reasonable unless it would be adequate to induce other attorneys to represent similarly situated clients seeking relief comparable to that obtained in the case at hand.

See also *Blum*, 104 S. Ct. at 1550 (Justice Brennan, joined by Justice Marshall, concurring).

The Circuits are in conflict on this issue. Ten Circuits have adopted the view stated in Justice Brennan's opinion in *Hensley*.[16] And, the Seventh Circuit has joined the court below in the contrary position.[17]

The legislative history expressly contemplates that the contingent nature of an attorney's compensation should be a factor in determining the amount of fee awards in

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[16] Post-*Blum*: *Hall v. Borough of Roselle*, 747 F.2d 838, 842-43 (3rd Cir. 1984); *Institutional Juveniles v. Secretary of Public Welfare*, —— F.2d ——, Nos. 83-1696 & 83-1722 (3rd Cir. 1985); *Craik v. Minnesota State University Board*, 738 F.2d 348, 350-51 (8th Cir. 1984); *Jones v. Central Soya Co., Inc.*, 748 F.2d 586, 591-93 (11th Cir. 1984).

Pre-*Blum*: *Yates v. Mobile County Personnel Board*, 719 F.2d 1530, 1533-34 (11th Cir. 1983); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1138 (11th Cir. 1984); *Graves v. Barnes*, 700 F.2d 220, 222, 224 (5th Cir. 1983); *Louisville Black Police Off. v. City of Louisville*, 700 F.2d 268, 279-81 (6th Cir. 1983); *Maceira v. Pagan*, 698 F.2d 38, 41 (1st Cir. 1983); *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977) (*affirming* 64 F.R.D. 680, 685-86 (N.D. Cal. 1974)), *rev'd on other grounds*, 436 U.S. 547 (1978); *White v. City of Richmond*, 713 F.2d 458, 462 (9th Cir. 1983); *Cooper v. Singer*, 719 F.2d 1496, 1500, 1501 n.8 (10th Cir. 1983); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2nd Cir. 1974); *Cohen v. West Haven Bd. of Police Com'rs*, 638 F.2d 496, 505 (2nd Cir. 1980); *Anderson v. Morris*, 658 F.2d 246, 248-49 (4th Cir. 1981).

[17] *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984).

civil rights cases. Thus, as the Court in *Hensley* recognized, the factors for setting fee awards, which were identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and adopted by Congress, include "whether the fee is fixed or contingent." 461 U.S. at 429-430 & n.3; see also *id.* at 434 n.9. And, the decisions referred to in the congressional reports as "correctly appl[ying]" (461 U.S. at 430) the *Johnson* factors include *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) (*subsequently aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other gronds*, 436 U.S. 547 (1978)). The decision in *Stanford Daily*, to which Congress pointed, stated:

> Federal court decisions generally reason that the amount of any award of attorneys' fees should reflect any contingencies which stood between the attorneys and their deserved fee. . . . These decisions parallel the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed-fee work. *Cf.* Canon 2 of the Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 2-106(b)-(8) (1969).
>
> * * * *
>
> Clearly, this court must increase the fees award obtained by multiplying the number of work hours by the average billing rate to reflect the fact that the attorneys' compensation . . . was contingent in nature. [64 F.R.D. at 685-86]

Under the contrary ruling of the court below, a lawyer undertaking a plaintiff's civil rights case is on notice that if the plaintiff loses he will collect no fee, and if the plaintiff prevails he can receive only the fee he normally charges in non-contingent cases. If the decision below is left undisturbed, cases the magnitude of this one simply will not be brought for want of qualified attorneys willing to undertake the enormous risk of non-compensation. What lawyers in the future would be

willing to devote so much of their professional careers to a massive class action like *Laffey*, knowing that if they lose they will collect nothing and that if they achieve virtually total success they will receive only what could have been collected *without risk* from regular fee-paying clients?

The words of the Eleventh Circuit in *Yates*, 719 F.2d at 1534, are pertinent here:

> Vindication of the policy of the law depends to a significant degree on the willingness of highly skilled attorneys, such as those now before the court, to accept employment in discrimination cases on a wholly contingent basis. They will hardly be willing to do so if their potential compensation is limited to the hourly rate to which they would be entitled in non-contingent employment. Busy and successful attorneys simply could not afford to accept contingent employment if those were the rules that were applied. The enforcement of our civil rights acts would then be entrusted largely to less capable and less successful lawyers who lack sufficient employment. Such an arrangement would ill serve policies of enormous national importance.

The availability of contingency adjustments thus is critical to the enforcement of the federal civil rights laws. The issue is open in this Court, and has been resolved in a conflicting manner by the Circuits. This case presents an appropriate occasion for this Court definitively to resolve the question. The Court should do so.

CONCLUSION

The Court should grant this petition for a writ of certiorari to review the opinion and judgment of the District of Columbia Circuit in this case.

Respectfully submitted,

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No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MARY P. LAFFEY, *et al.*,
Petitioners,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1838

MARY PAT LAFFEY, *et al.*

v.

NORTHWEST AIRLINES, INC.,
Appellant

AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

No. 83-1839

MARY PAT LAFFEY, *et al.*

v.

NORTHWEST AIRLINES, INC.,
Appellant

AIR LINE PILOTS ASSOCIATION, NON-ALIGNED PARTY

No. 83-1896

MARY PAT LAFFEY, *et al.*,
Appellants

v.

NORTHWEST AIRLINES, INC.

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 70-02111)

Argued 12 April 1984

Decided 28 September 1984

Before WRIGHT, TAMM and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

Dissenting opinion filed by *Circuit Judge* WRIGHT.

WILKEY, *Circuit Judge*: Northwest Airlines, Inc., appeals from an award of $3,453,779.49 in attorneys fees and costs to counsel for plaintiffs. We find that the district court abused its discretion in calculating the fee award. Accordingly, we reverse and remand.

I. FACTS

This case involves a dispute over the amount of attorneys fees due the plaintiffs as prevailing party in a complex and long-standing employment discrimination suit. The suit on the merits began in 1970. Acting on behalf of more than 3,300 women employed by Northwest Airlines, Inc., the plaintiffs challenged various personnel management practices of Northwest under Title VII and the Equal Pay Act.

In 1973 the trial court essentially adopted the legal arguments urged by the plaintiffs, and issued an order in their favor.[1] In 1976 a panel of this court sustained the

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[1] *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 437 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (*"Laffey I"*).

This court has heard aspects of this case on three other occasions. In 1980 a panel of this court declined to modify an injunction issued by the district court. *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 580 (D.C. Cir. 1980) (*"Laffey II"*). The appeal in *Laffey I* also resulted in a separate published opinion relating to plaintiffs' entitlement to costs. *Laffey v. Northwest Airlines, Inc.*, 587 F.2d 1223 (D.C. Cir. 1978) (per curiam).

Finally, on 20 July 1984, this court issued an opinion intended to serve as the circuit's "closing chapter" on the merits of the controversy. *Laffey v. Northwest Airlines, Inc.*, Nos. 83-1033, 83-1034, 83-1167 & 83-1168 (D.C. Cir. 20 July 1984) (*"Laffey III"*).

trial court's statutory interpretation, but remanded for reconsideration of the proper remedy. This court denied rehearing en banc in 1977, and in 1978 the Supreme Court declined to issue a writ of certiorari. Upon remand, the district court awarded $52 million in compensatory relief, as well as significant injunctive relief.[2] That ruling has been affirmed in principal part by another panel of this court.[3]

Following the close of litigation on the merits, the fee application process began in earnest. In June of 1982 the district court ordered counsel to commence negotiations on the attorneys fees.[4] Bredhoff & Kaiser, the attorneys for the plaintiffs throughout the merits phase of this litigation, retained Daniel Rezneck of Arnold & Porter to negotiate and, if necessary, litigate the attorneys fee award.[5]

In November 1982 the parties reported to the court that their negotiations had been fruitless.[6] Litigation over the size of the fees began. Pursuant to a timetable presented by the parties and approved by the trial court, the parties entered several months of simultaneous discovery. During this period the attorneys for the plaintiffs sought to discover the fees received by the counsel for the defense; the court refused to compel discovery of this information.

The plaintiffs subsequently requested just over $5 million to cover all attorneys fees and expenses from 15 July 1970 to 15 July 1983; the defendants proposed an award

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[2] *Laffey v. Northwest Airlines, Inc.*, 32 Fair Empl. Prac. Cas. (BNA) 758 (D.D.C. 1982), *aff'd in part and rev'd in part*, 35 Fair Empl. Prac. Cas. (BNA) 508 (D.C. 1984).

[3] *See Laffey v. Northwest Airlines, Inc.*, Nos. 83-1033, 83-1034, 83-1167, and 83-1168.

[4] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 360 (D.D.C. 1983).

[5] *Id.*

[6] *Id.*

of just over $1 million. In reaching these rather divergent figures, both plaintiffs and defendants relied on the "lodestar" approach adopted by this Court in *Copeland v. Marshall*,[7] setting separate lodestar figures for the litigation on the merits and the litigation on the attorneys fees.[8] Both sides supplemented their proposals with copious appendices, exhibits, affidavits, charts, and summaries.[9]

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[7] 641 F.2d 880 (D.C. Cir. 1980) (en banc).

[8] 572 F. Supp. at 360-61.

[9] *Id.* at 360. The fees suggested by the parties to the litigation are as follows:

BREDHOFF & KAISER	Laffey's Proposal	NWA's Proposal
Merits Issues		
Fees: Lodestar	$1,494,450.80	$ 903,875.15
200% Adjustment	2,988,901.60	["very modest" contingency increase]
Expenses: Paralegals/Clerks	76,290.15	76,065.00
Disbursements	101,183.84	29,390.04
Subtotal:	$4,660,826.39	$1,009,330.19
Attorneys Fee Issues		
Fees: Lodestar	$ 193,481.27	$ 39,240.63
Expenses: Paralegals/Clerks	27,529.50	9,244.50
Disbursements	4,960.32	608.81
Subtotal:	$ 225,971.09	$ 49,093.94
ARNOLD & PORTER		
Attorneys Fee Issues		
Fees: Lodestar	$ 164,893.75	$ 25,070.76
Expenses: Paralegals/Clerks	25,770.00	10,061.25
Disbursements	20,916.33	2,589.63
Subtotal:	$ 211,580.08	$ 37,721.64
TOTAL:	$5,098,377.56	$1,096,145.77

Id. at 360-61.

A. *Proposed Fee for Litigating the Merits*

Both plaintiffs and defendants substantially agreed on the number of hours "reasonably expended" in the litigation on the merits. The defendants raised two objections to the quantity of hours—a request for 160.5 hours logged by an attorney who was not a member of the firm but who did attend the trial and assist the Bredhoff & Kaiser attorneys,[10] and an objection to 254.25 attorney hours spent on allegedly non-compensable issues.[11] Both sides agreed to the validity of the remaining 10,929.50 hours expended on the merits.

The parties differed radically, however, on how the reasonable hourly rates should be set. The defendants proposed figures based on the hourly rates *actually charged* by Bredhoff & Kaiser attorneys *in similar cases.* The defendants then invited the court to examine whether certain work done by partners could have been done by associates or even paralegals,[12] and to compensate that work at lower rates if "partner-level" expertise had not been required.[13] The plaintiffs proposed rates intended to reflect a "*prevailing community rate*" [14]—a rate, as it happened, *substantially exceeding* that ordinarily charged by Bredhoff & Kaiser attorneys. The plaintiffs substantiated the validity of this rate with voluminous affidavits from their own and other area attorneys.

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[10] *Id.* at 364.

[11] *Id.* at 362.

[12] *Id.* at 365.

[13] *Id.* at 365-66.

[14] *Id.* at 371 (quoting *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982) (per curiam)). The fee schedule proposed by Laffey and adopted by the court was as follows: $175 per hour for very experienced federal court litigators in their twentieth year or more after graduation from law school; $150 an hour for experienced federal litigators in their eleventh through nineteenth years after law school

The parties thus proposed significantly different lodestar figures for the merits. The plaintiffs sought a merits lodestar of $1,494,450.80. The defendants proposed a merits lodestar of $903,875.15.[15]

The plaintiffs then proposed two separate 100 percent multipliers of the merits lodestar—one to account for the quality of the work performed, and another to account for the contingency of payment.[16] The defendants proposed no multiplier at all.[17] With these multipliers taken into account, the plaintiffs sought $4,483,352.40 as attorneys fees for the litigation on the merits.

B. *Proposed Fee for Litigating the Attorneys Fees Award*

The parties also differed radically on the proper award for litigating the attorneys fee issue. Laffey sought compensation for 2,579 hours spent by Bredhoff & Kaiser and Arnold & Porter attorneys in compiling the fee award. Northwest argued that only 930.25 attorney hours were compensable.[18] In objecting to the bulk of the hours sought by Laffey's attorneys, Northwest raised three objections: (1) that needless hours were spent compiling affidavits, some of which detailed the history of the case for a trial judge who had presided over it from its inception, and others of which described the billing practices of other area attorneys; (2) that need-

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graduation; $125 an hour for experienced federal litigators in their eighth through tenth years after graduation from law school; $100 an hour for senior associates in their fourth through seventh years after graduation from law school; and $75 an hour for junior associates in their first through third years after graduation from law school. *Id.*

[15] *Id.* at 360-61.

[16] *Id.* at 375-76.

[17] *Id.* at 376.

[18] *Id.* at 366-67 & n.23.

less hours were spent in interfirm meetings which would not have occurred had Bredhoff & Kaiser not retained Arnold & Porter; and (3) that needless hours were spent seeking discovery of irrelevant facts.[19]

With the variation of hours and hourly rates taken into account, Laffey proposed a lodestar for attorneys fees of $358,375.02; Northwest proposed $64,311.39.[20]

C. *Expenses*

The parties also differed significantly on whether plaintiffs could be reimbursed for various expenses incurred in the litigation. Northwest first objected to many of the hours spent by paralegals and law clerks on the case. It then objected to compensating any out-of-pocket expenses in excess of those includable in taxable costs. Laffey sought a total of $256,650.14; Northwest offered slightly less than half of that, $127,959.23.[21]

D. *Proposed Total Fees*

Laffey ultimately requested $5,098,377.56 in attorneys fees. This request reflected a lodestar of $1,494,450.80 on the merits, two 100 percent multipliers of that lodestar, an attorneys fee lodestar of $358,375.02, and expenses of $256,650.14.[22]

Northwest proposed a total fee of $1,096,145.77. This reflected a lodestar on the merits of $903,875.15, no multipliers, an attorneys fee lodestar of $64,311.39, and costs of $127,959.23.[23]

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[19] *Id.* at 367-70.

[20] *Id.* at 361.

[21] *Id.* at 381; *see id.* at 382-88.

[22] *Id.* at 360-61.

[23] *Id.*

E. *District Court Award*

The district court awarded plaintiffs $3,469,829.49. This award reflected a lodestar of $1,471,241.25 on the merits, a doubling of that lodestar to account for the "risk premium," an attorneys fee lodestar of $294,324.99 and costs and expenses of $216,972.00.[24]

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[24] The actual award made by the district court is set out below.

MERITS LODESTAR

Attorney	Hourly Rate	Merits Hours	Merits Fees	Total Merits Fees
Bredhoff	175	0	0	0
Feldman	100	160.5	16,050.00	$ 16,050.00
Cohen	150	21.5	3,225.00	6,900.00
	175	21.0	3,675.00	
Gottesman	150	3,248.375	487,256.25	876,294.36 [sic—876,294.37]
	175	2,223.075	389,038.12	
Weinberg	100	37.375	3,737.50	161,937.50
	125	145.25	18,156.25	
	150	933.625	140,943.75 [sic—140,043.75]	
Petramalo	100	32	3,200.00	46,121.88
	125	331.375	41,421.88	
	150	10	1,500.00	
D. Clark	75	1,817.75	136,331.25	199,981.25
	100	636.50	63,650.00	
P. Clark	100	606.625	60,662.50	72,115.62
	125	91.625	11,453.12	
Collins	75	36.25	2,718.75	80,793.75
	100	780.75	78,075.00	
Gilson	100	53	5,300.00	5,300.00
Brudney	75	75.625	5,671.88	5,746.88
	100	.75	75.00	
			TOTAL:	$1,471,241.25

ATTORNEYS FEE LODESTAR

Attorney	Hourly Atty. Fee Rate	Hours	Total
Bredhoff	$175	10.75	$ 1,881.25
Cohen	175	12.0	2,100.00
Gottesman	175	596.25	104,343.75
Weinberg	150	357.875	53,681.25
Petramalo	150	2.0	300.00
P. Clark	125	12.125	1,515.62
Collins	100	10.5	1,050.00
Gilson	100	2.625	262.50
Brudney	75	52.375	3,928.12
	100	10.75	1,075.00
Rezneck	175	371.875	65,078.12
Burt	150	116.00	17,400.00
Lindon	75	556.125	41,709.38
		TOTAL:	$294,324.99

COMPENSABLE COSTS & EXPENSES

Disbursements:		
Merits Issues		$ 88,804.93
Attorneys Fee Issues		5,017.19
	Subtotal:	$ 93,822.12
Paralegals & Law Clerks:		
Bredhoff & Kaiser		
Merits Issues	2578.55 hrs. x $30/hr. =	$ 77,356.50
Attys. Fee Issues	605.65 hrs. x $30/hr. =	$ 18,169.50
Arnold & Porter	658.75 hrs. x $30/hr. =	$ 19,762.50
	Subtotal:	$115,288.50
Ms. Laffey's Expenses:		$ 7,861.38
	TOTAL:	$216,972.00

TOTAL AWARD OF ATTORNEYS FEES & COSTS

Merits Lodestar:	$1,471,241.25
100% Multiplier:	1,471,241.25
Attorneys Fee Lodestar:	294,324.99
Costs & Expenses:	216,972.00
TOTAL:	$3,453,779.49

Id. at 388.

The district court carefully scrutinized the number of hours claimed by Laffey.[25] With regard to the merits, the court rejected Northwest's claim that certain issues were non-compensable as "lost," but did exclude a portion of those hours as not being reasonably expended.[26] The court also allowed compensation for hours expended by a lawyer not affiliated with either of the firms representing Laffey, but at a reduced hourly rate.[27]

The court found compensable the great majority of the 2,579 hours claimed for litigating the attorneys fee, but excluded 467.75 hours as being unreasonable or excessive.[28] The deductions made by the trial court reflected adjustments for preparation of excessive affidavits, redundant work caused by the introduction of a new law firm into the case, and other inefficient practices. It did not exclude the hours expended in offensive discovery, finding that the discovery requests, while ultimately unsuccessful, were "not frivolous, but were *bona fide* efforts to advance Plaintiffs' legitimate litigation interests." [29]

In the award the district court rejected Northwest's claim that the plaintiffs' attorneys should be restricted to their own market rates, awarding them instead "prevailing market rates" based on a matrix drawn from the rates charged by other attorneys.[30] While evidence of Bredhoff & Kaiser's normal rates was filed with the court, the trial judge apparently *relied not at all* on the firm's normal billing rates. Instead, the trial court found that it was "not limited to counsels' historic fees but must frame an award that reflects the *true value* of the

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[25] *Id.* at 361-71.

[26] *Id.* at 362-64.

[27] *Id.* at 364-65, 375 n.37.

[28] *Id.* at 366, 371.

[29] *Id.* at 368-70.

[30] *Id.* at 371-75. *See supra* note 14.

services rendered." [31] The court then fixed "generous" [32] rates at the highest end of rates charged by firms in the community.

The court refused to adjust the hourly rates to account for alleged inefficiencies in the utilization of attorneys. It found the defense objection to the staffing patterns employed by Laffey's attorneys to be based on "the erroneous assumption that there is a single, correct staffing pattern for every lawsuit"; [33] it concluded that allocation of responsibility within a firm depended on many variables and found the allocation chosen by Laffey's attorneys to be reasonable.[34]

The court granted a 100 percent multiplier to account for contingency of payment.[35] In doubling the merits award to account for the contingency of payment, the court first found it beyond dispute that plaintiffs were "*entitled*" to a risk adjustment of some sort simply because receipt of fees depended on the successful termination of the litigation.[36] The court assessed the initial likelihood of success at approximately 50 percent; [37] taking into account the chance of failure and the number of hours placed at risk, the court found the plaintiffs "fully

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[31] *Id.* at 373 (emphasis added and footnote omitted).

[32] *Id.* at 374.

[33] *Id.* at 366.

[34] *Id.*

[35] *Id.* at 377-80.

[36] *Id.* at 378. The district court recognized that any adjustment for contingency depends upon the contingency of payment, and only derivatively upon the contingency of success. *Id.* at 377. The court apparently erroneously assumed, however, that contingency adjustments were always to be made when payment was uncertain. *Id.* at 378.

[37] *Id.* at 379.

deserving" of a 100 percent contingency adjustment.[38] The court rejected a requested 100 percent multiplier for excellence of results, finding that the acknowledged excellence of the firms involved was reflected in the lodestar rates.[39]

The court found that the plaintiffs were entitled to compensation for costs which were not taxable, and held the documentation to be adequate. It also found compensable the lost income suffered by Laffey because of her involvement in the case. The trial court carefully scrutinized the costs claimed by both Laffey and her attorneys, however, and disallowed some as unreasonable.[40]

F. *Issues on Appeal*

The defendant appeals the award to this court. This appeal presents five major issues: (1) whether the "reasonable hourly rate" for private, for-profit law firms should be based on the rates the firm charges in the marketplace; (2) whether the district court abused its discretion in finding that the plaintiffs' counsel's allocation of tasks among partners and associates was reasonable on the facts of this case; (3) whether the district court abused its discretion in doubling the lodestar fee on the merits to account for the risk of not prevailing; (4) whether the district court abused its discretion by awarding compensation for litigating the attorneys fee issue; and (5) whether plaintiffs in Title VII and Equal Pay Act cases may be awarded compensation for reasonable expenses which are not taxable costs under 28 U.S.C. § 1920 (1982).

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[38] *Id.* at 380.

[39] *Id.* at 376-77.

[40] *Id.* at 381-88.

II. ANALYSIS

The Equal Pay Act [41] and Title VII of the Civil Rights Act of 1964 [42] authorize district courts to award a reasonable attorneys fee to prevailing civil rights litigants. The purpose of such provisions is to encourage private litigants to act as "private attorneys general" on behalf of enforcement of the civil rights laws.[43] Congress clearly hoped to provide an adequate economic incentive for private attorneys to take employment discrimination cases, and thereby to ensure that plaintiffs would be able to obtain competent legal representation for the prosecution of legitimate claims.[44]

Despite the clarity of Congress's objective, "[this] new field of law . . . has grown so fast and become so complex that it has baffled the efforts of courts and lawyers to comprehend and apply it." [45] Before 1975, federal courts had awarded attorneys fees on their own authority on the theory that private attorneys general should be compensated for enforcing certain important rights.[46] In *Alyeska Pipeline Service Co. v. Wilderness Society*, however, the Supreme Court criticized this practice and warned lower federal courts that they lacked power to award fees to private attorneys general in the absence of express authorization from Congress.[47] Con-

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[41] 29 U.S.C. § 216(b) (1982).

[42] 42 U.S.C. § 2000e-5(k) (1982).

[43] *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401-02 (1968).

[44] *Id.*

[45] Cutler, *Foreword* to 1 M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES vii (1983).

[46] *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 n.46 (1975) (citing cases).

[47] *See id.* at 263-64, 269.

gress enacted a law authorizing such awards to prevailing civil rights litigants the following year.[48]

Throughout this turbulent period, confusion reigned. One scholar's review of the case law led him to conclude that "[t]he only truly consistent thread that runs throughout federal court decisions on attorneys' fees is their almost complete inconsistency."[49] He elaborated:

> Given the frequency with which courts are confronted with the task of fee setting and the impact that it has upon the allocation of legal resources, one would expect a general consensus to have emerged on the manner in which reasonable attorneys' fees should be determined. On the contrary, there are nearly as many approaches to the issue as there are judges. . . . [M]any lower courts have confronted the problem with little or no analysis; those courts that have been more analytical have adopted widely varying approaches. To a great extent the outcome to these cases has depended upon "the roll of the dice"—from court to court and from case to case.[50]

Examples of inconsistent fee awards to prevailing parties are not hard to find. Suggestive of the lack of clear guidelines is a report on the "U.S. Court of Appeals for the Second Circuit, . . . [which] recently upheld Section 1988 awards to Wall Street's Cravath, Swain & Moore at the hourly rate of $60 in *McCann v. Coughlin*, 698 F.2d 112 (2d Cir. 1983), and to the New York Legal Aid Society at rates exceeding $150 per hour in the *Blum* [*v.*

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[48] Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982); *see* S. REP. No. 1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5909; H.R. REP. No. 1558, 94th Cong., 2d Sess. 2-3 (1976).

[49] Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 292 (1977).

[50] *Id.* at 283-84.

Stenson] case." [51] More generally, a National Association of Attorneys General study released just this year found that:

> With different approaches being applied by the different circuits and even by various courts within each circuit, parties . . . are subject to different approaches and hence different results. Courts disagree on what factors should be applied, how they should be applied, and even what they mean . . . As a result, in cases decided between 1974 and 1979, hourly rates awarded to civil rights attorneys varied by 685 percent.[52]

"At present, the enormous variation of fee awards cannot be explained in terms of the differing facts and circumstances from case to case. . . . As a result, from court to court and from case to case, attorneys and litigants who are similarly situated are subjected to widely differing treatment." [53]

To reduce the arbitrariness characteristic of court awards of attorneys fees, the Supreme Court recently intervened and approved a version of the lodestar method of setting rates. In *Hensley v. Eckerhart*,[54] the Court set forth the elements of this method for arriving at a fair attorneys fee: "The most useful starting point for de-

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[51] Diamond, *The Firestorm over Attorney Fee Awards*, 69 A.B.A. J. 1420, 1420 (1983).

[52] Report to the Congress of the National Association of Attorneys General, *Civil Rights Attorney's Fees Awards Act of 1976* 12 (3 Feb. 1984), *quoted in* Address by Randall Rader, Second Institute on Federal Civil Procedure (Houston, Tex. May 1984) (unpublished manuscript entitled *The Fee Awards Act of 1976: Examining the Foundation for Legislative Reform of Attorney Fee Shifting* 24).

[53] Berger, *supra* note 49, at 292.

[54] 103 S. Ct. 1933 (1983). *Hensley* involved the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982). The inquiry is the same. *See infra* note 66.

termining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." [55] The product of the reasonable hourly rate times the hours reasonably expended is termed the "lodestar" figure.[56]

In *Hensley* the Court specified the basic methodology for setting the "hours reasonably expended." [57] The district court must exclude hours not reasonably worked. The parties are first called upon to exclude hours which are "excessive, redundant, or otherwise unnecessary"; should they fail to exercise such " 'billing judgment,' " the court should exclude the hours.[58] Also eliminated from the calculus are hours spent on "unsuccessful claims." [59]

More recently the Court has provided guidance on how to derive the second half of the equation, the "reasonable hourly rate." In *Blum v. Stenson*,[60] the Court faced a situation in which a non-profit law firm had represented the prevailing plaintiffs. The court held that the attorneys should receive fees based on the "prevailing market

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[55] 103 S. Ct. at 1939.

[56] The "lodestar" approach was first adopted by the Court of Appeals for the Third Circuit in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp. (Lindy I)*, 487 F.2d 161, 166-69 (3d Cir. 1973), and its successor case, *Lindy Bros. Builders Inc. v. American Radiator & Standard Sanitary Corp. (Lindy II)*, 540 F.2d 102, 108-22 (3d Cir. 1976). This circuit adopted the lodestar methodology in *Copeland v. Marshall*, 641 F.2d 880, 890-91 (D.C. Cir. 1980) (en banc).

[57] 103 S. Ct. at 1939.

[58] *Id.* at 1940 (quoting *Copeland v. Marshall*, 641 F.2d at 891).

[59] *Id.*

[60] 104 S. Ct. 1541 (1984).

rates in the relevant community," rather than on the cost of providing the legal service.[61]

As the Court noted in *Hensley*, setting the lodestar figure "does not end the inquiry." [62] The district court may adjust the fee upward or downward due to factors not reflected in the lodestar, with the most important factor supporting adjustment being the degree of success obtained. In *Hensley* the Supreme Court observed that the trial judge "may consider other factors" identified in *Johnson v. Georgia Highway Express, Inc.*, though noting that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." [63] Among the factors identified in *Johnson* is "[w]hether the fee is fixed or contingent." [64]

In adopting the lodestar method of setting attorneys fees, the Supreme Court has placed great emphasis on the need for an efficient, objective system of awarding fees. One stated reason for choosing the lodestar approach is that it "provides an objective basis" on which to base the more subjective "enhancements" of the fee.[65] The Court clearly hoped that this objective basis would enable parties and courts to avoid "a second major litigation" over the size of attorneys fees; ideally, the Court posited, the parties could settle the attorneys fee issue out of court.[66]

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[61] *Id.* at 1547.

[62] 103 S. Ct. at 1940.

[63] *Id.* at 1940 n.9 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

[64] 488 F.2d at 718.

[65] 103 S. Ct. at 1939.

[66] *Id.* at 1941. The Court intended to promote objectivity and efficiency in fee setting under the provisions governing this case, 29 U.S.C. § 216(b) (1982) and 42 *id.* § 2000e-5(k), as well as under 42 *id.* § 1988, which was before the Court in *Hensley* and

A. *Reasonable Hourly Rates*

All parties agree that the attorneys for the plaintiffs in this case ought to be paid a "reasonable hourly rate";[67] all agree that the ultimate measure of the reasonableness of the hourly rate should be the "market rate" for Bredhoff & Kaiser's services.[68] The rather narrow task before this court is to determine how that "reasonable market rate" should be set.

Laffey argues that the court must apply the same procedures to "for-profit" firms that it applies to nonprofit legal organizations.[69] In each case the court must assess

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Blum. The Court in *Hensley* observed that § 2000e-5(k) and § 1988 were in pari materia and emphasized that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 103 S. Ct. at 1939 n.7.

[67] *See Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980) (en banc).

[68] *See Blum v. Stenson*, 104 S. Ct. 1541, 1547 (1984).

[69] Brief for Appellees at 28-43. Laffey's attorneys also argue that the rates charged by Bredhoff & Kaiser do not reflect the firm's market value. It is claimed that the Bredhoff & Kaiser attorneys could increase their rates at will, but choose to subsidize their clients by charging lower rates. Bredhoff & Kaiser is thus presented as a "quasi" public interest law firm—following the same billing practices as an ordinary private law firm, employing the same firm structure as a private law firm, but differing in that its lower rates reflect the value its lawyers put on serving "good" clients. The Bredhoff & Kaiser attorneys have chosen "to represent Bredhoff & Kaiser's existing clientele—despite the lower hourly rates—because of the personal satisfactions they derive from that practice." *Id.* at 29 n.16 (citation omitted).

We do not doubt the sincerity of this assertion, nor do we doubt that the Bredhoff & Kaiser attorneys could have pursued careers at other firms. We find, however, that this court and all courts are incapable of adjusting rates of private law firms to reflect the lost income due to "personal satisfactions." There simply is no means

the "true value" of attorneys with similar skills, and pay them according to that true value. The rates charged by

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of distinguishing those warranting an adjustment from those that do not.

First, the fact that Bredhoff & Kaiser's clients cannot afford unlimited legal fees fails to distinguish them. Small corporations, individual clients, and unions alike have finite resources; even those with deep pockets are driven to spend their money in the most efficient way. There simply is no pool of clients eager to spend legal fees without regard to value or cost.

Nor does it matter that many of Bredhoff & Kaiser's clients enjoy a privileged tax status that makes unavailable any deduction for legal fees. Again, many sorts of clients are unable to claim tax deductions for attorneys fees—including non-profit foundations, corporations without taxable profits, and individuals whose legal expenses are not business related.

Finally, a fee setting formula that requires district courts to adjust the award if the prevailing lawyers serve "good" clients is unacceptable. At worst, *this factor invites courts to reward those plaintiffs who represent causes the judge involved finds estimable, a discretionary power we doubt Congress intended to confer on the judiciary.* At best, it allows attorneys to indulge in self-serving claims that their clients—whether they be unions representing allegedly downtrodden workers, corporations which claim to create wealth and jobs, or individuals who need good legal advice—are the "best" and most deserving. Courts should allow personal satisfactions to remain personal.

The dissent relies on three of this court's cases to prove that we ordinarily set the reasonable hourly rate above the firm's customary billing rate to make up for a firm's charging below-market rates to clients who serve the public interest. *See* dissent at 7-9 & n.8. The dissent's characterization of the holdings of these cases is too broad.

The first case, *Sierra Club v. Gorsuch*, 684 F.2d 972 (D.C. Cir. 1982) (per curiam), *rev'd on other grounds sub nom. Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274 (1983), is simply inapposite. In *Gorsuch*, we stated that an affidavit of a private attorney retained by a non-profit public interest group was not necessary to complete the fee application in that particular case, because "evidence of recent court awarded fees in comparable cases to comparably experienced lawyers exist[ed] to satisfy the demands of *Copeland* and *NACV* that court awarded fees be based on the prevailing market rate for the attorney's services." *Id.* at 975 (footnote

a firm have some probative value, but may be discounted or ignored if the court finds that other attorneys of simi-

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omitted). *Gorsuch* is consistent with our approach that when calculating fee awards to attorneys or law firms *without* firmly established billing practices, the prevailing community rate for the services of lawyers of similar skill, experience, and reputation must be consulted. *See id.* (implying that attorney did not have established billing practice by noting that he "represent[ed] primarily non-profit public interest organizational clients" and in the same sentence directing the reader to a quotation in a footnote discussing "lawyers associated with public interest groups" as those "not hav[ing] an established 'billing rate' that reflects how their own services have been valued in the market" (quoting *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982) (per curiam))). It does not support the notion that lawyers should be paid more for serving "good" clients.

The second case, *National Treasury Employees Union v. Nixon*, 521 F.2d 317 (D.C. Cir. 1975), did authorize enhancement of a fee award to take account of the possibility that "counsel serve organizations like appellant for compensation below that obtainable in the market because they believe the organizations further the public interest." *Id.* at 322-23 (internal brackets and footnote omitted). But the court's authority for awarding a fee in *National Treasury Employees Union* was the "common fund" theory, *see id.* at 319, under which equitable principles designed to prevent unjust enrichment, *see Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1625-26, 1652 (1974), may provide sufficient discretion to award fees commensurate with an attorney's "true value," *cf. Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166-67 (1939) (emphasizing that common fund fee awards originated in the authority of the chancellor "to do equity in a particular situation" and the con-comitant necessity to make individualized applications of this "discretionary power"); *Trustees v. Greenough*, 105 U.S. 527, 536 (1881) (Chancery's control over fees in common fund litigation is "to be exercised as equity and justice may require"); *Gee v. Pritchard*, 36 ENG. REP. 670, 679 n.1 (Ch. 1818) (Equity is as inconstant as the length as the Chancellor's foot (quoting Selden's *Table Talk*)). Although the propriety of this enhancement for serving "public interest" clients may be questioned, we need not reopen that matter here. For in this case we construe a statute, the purpose of which is to induce lawyers to undertake representation of meritorious civil rights claimants. Fee

lar caliber charge more or less. The trial court enjoys broad discretion to set rates within the parameters of the rates charged by other lawyers in the community.

Northwest argues that the complex and burdensome task of establishing a "prevailing market rate" is a necessary evil which cannot be avoided where non-profit firms are involved, but which should be dispensed with where private, for-profit law firms have established market rates for similar services.[70] Under this approach the rates customarily charged by a firm would presumptively stand as the reasonable rates.

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awards greater than the opportunity cost of the lawyers' foregone litigation opportunities would constitute congressionally-proscribed "windfalls" under the act. *See infra* pp. 22-23.

Finally, the dissent's citation of *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982) (per curiam)—far from proving that fee awards are adjusted *upward* to compensate lawyers for not charging their clients what the market will bear—supports our holding that an attorney's customary billing rate is presumptively his reasonable hourly rate for determining an award of attorneys fees: "This ['prevailing community'] rate is not what he [the attorney] would have liked to receive, or what the client paid in a single fortunate case, but what on average counsel has *in fact* received. It is obvious that where counsel customarily exercises billing judgment by not billing at the market rate or for the full amount of time expended this fact must be considered in calculating counsel's *true billing rate*." *Id.* (emphasis added and footnote omitted). As we stated in the paragraph preceding the one cited by the dissent, "counsel for applicants may be required to submit specific evidence of his or her actual billing practice during the relevant time period, if in fact applicant has a billing practice to report. . . . [T]he actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate." *Id.* (footnote omitted). Although "affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases" and "[r]ecent fees awarded by the courts" provide "useful guides in setting an appropriate rate," "[t]he best evidence would be the hourly rate customarily charged by the affiant himself or by his law firm." *Id.* at 1325.

[70] Brief for Northwest Airlines, Inc. at 28-46.

The positions of the parties are no doubt affected by the fact that in this case the "prevailing market rate" established by the district court exceeds "any hourly rate at which [Bredhoff & Kaiser] . . . has ever billed its regular fee-paying clients." [71] However, this discrepancy need not exist in every case—under both approaches the touchstone remains the "market value" of the services rendered; any deviation between the court's and the market's assessment suggests that one or the other has misvalued the attorneys' services. The choice between the two methods thus does not involve a categorical choice between higher rates or lower rates, but questions of judicial administration.

1. Congressional Intent

As the Supreme Court observed in *Blum*, "[r]esolution of these . . . arguments begins and ends with an interpretation of the attorney's fee statute." [72] "The legislative history," the Court pointed out, "explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.'" [73] The "windfall" Congress sought to avoid is the awarding of fees in excess of the rate at which qualified counsel would be willing to repre-

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[71] 572 F. Supp. 354, 372 (D.D.C. 1983).

[72] *Blum v. Stenson*, 104 S. Ct. 1541, 1546 (1984).

[73] *Id.* at 1548 (quoting S. REP. No. 1011, 94th Cong., 2d Sess. 6 ("It is intended that the amount of fees awarded under . . . [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation . . . [Application of the] appropriate standards . . . have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.", *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913); *see also* H.R. REP. No. 1558, 94th Cong., 2d Sess. 9 (1976) ("The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys.").

sent civil rights claimants who have legitimate grievances. The congressionally-mandated inquiry is thus *not* into the "true value" or worth of an attorney's services. Instead, the trial court must ascertain the fee at which competent counsel would be willing to accept meritorious civil rights cases.[74] As this court recently stated in *Murray v. Weinberger*, "the purpose of the statute [authorizing fee shifting in Title VII cases] is to benefit meritorious claimants—not to subsidize the legal profession." [75]

Although the Supreme Court has not set out the method by which district courts are to determine the hourly rates of attorneys working for profit, the Court in *Blum* took pains to note that the "prevailing market rate"—that is, the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation"—was a term of convenience, rather than some ideal rate which all firms should or could charge.[76] The Court recognized that setting a market rate for legal services is inherently difficult, since in that "traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community." [77] But the Court observed that although the fee setting process in section 1988 cases differed from most private sector cases in that the *losing* party paid his op-

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[74] The dissent assumes its own conclusion by stating that the "prevailing market rate" approach inquires into the fees of equally skilled attorneys litigating equally complex matters. This is the proper inquiry when awarding fees to attorneys without billing histories; for lawyers in nonprofit law firms, for example, a proxy for the market must be found in order to set a reasonable hourly rate. When market information is available, however, a much more precise measure is at hand and its use is consistent with Congress's goal of awarding attorneys fees at a level sufficient to induce competent counsel to represent bona fide civil rights claimants.

[75] No. 83-1680, slip op. at 6 (D.C. Cir. 24 Aug. 1984).

[76] 104 S. Ct. 1541, 1547 n.11 (1984).

[77] *Id.*

ponent's legal fees,[78] the "critical inquiry in determining reasonableness is now generally recognized as the appropriate hourly rate. *And the rates charged in private representations may afford relevant comparisons.*" [79] Because the Legal Aid Society lawyers in *Blum* had no established billing rates, the Court required the parties to submit evidence of the "prevailing community rate." [80] Rates consistent with "those prevailing in the community" were deemed to be reasonable and were referred to —"for convenience"—as the "prevailing market rate." [81]

This court's cases are consistent with the Supreme Court's recent pronouncement in *Blum*. In *Copeland v. Marshall*,[82] this court approved fees based on the hourly rates customarily charged by the lawyers in a firm.[83] Again, in *National Association of Concerned Veterans v.*

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[78] *See id.*

[79] *Id.*

[80] *See id.*

[81] *Id.*

With regard to awards to private law firms, the Court may well have intended the prevailing community rate to function as an external standard by which district judges could verify the reasonableness of an attorney's customary billing rate.

> In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

Id.

[82] 641 F.2d 880 (D.C. Cir. 1980) (en banc).

[83] *See id.* at 887-88, 902.

Secretary of Defense,[84] we stated that "[t]he best evidence would be the hourly rate customarily charged by the affiant himself or by his law firm." [85] And in *Concerned Veterans*, while the applicants attempted to support their claim by referring to evidence of fees received in similar cases, the government argued that "there was no evidence . . . supporting the billing rates assigned to the associates who worked on this case"; this court remanded, holding that "[a]s private counsel with fee-paying clients, the applicants should have provided the Court with more informative data about the value of their services in the market." [86] Most recently, in *Murray v Weinberger*, this court approved the district court's use of attorneys' customary billing rates in awarding fees for litigation brought under Title VII.[87] Other circuits have also determined the reasonableness of attorneys fees by reference to the firm's own established rates.[88]

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[84] 675 F.2d 1319 (D.C. Cir. 1982) (per curiam).

[85] *Id.* at 1325.

[86] *Id.* at 1336. This holding in *Concerned Veterans* clearly requires that the rates actually be presumptively based on the firm's current rates, even as to the particular lawyers involved. It makes no sense to require a firm to document its own billing history and then totally ignore that history in setting the hourly rate. Nonetheless, that is what the district court did here.

[87] No. 83-1680, slip op. at 7 & n.21 (D.C. Cir. 24 Aug. 1984).

[88] *See, e.g., Pawlak v. Greenawalt*, 713 F.2d 972, 979 (3d Cir. 1983) ("[T]he value of an attorney's services is generally measured by his billing rate." (citation omitted)), *cert. denied*, 104 S. Ct. 707 (1984); *Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 277 (6th Cir. 1983) ("As we pointed out in *Northcross*, the marketplace normally sets a value for a private attorney's services: 'The hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney.' 611 F.2d at 638."); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 769 (7th Cir. 1982) ("If, however, a party does not find counsel readily available in that locality with whatever degree of skill may reason-

The district court apparently believed that setting the "market rate" required precisely the same methodology employed to set the "prevailing market rate" [89] in *Jordan v. United States Department of Justice*,[90] in which this court accepted an affidavit recounting the rate "prevailing in the local legal community" [91] for similar legal services. But this court in *Jordan*—like the Supreme Court in *Blum* [92]—did not discuss the manner in which reasonable hourly rates for *private* attorneys should be set; because the attorneys involved had no regular billing rates, the court was required to set a hypothetical rate where none otherwise existed.

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ably be required, it is reasonable that the party go elsewhere to find an attorney, and the court should make the allowance on the basis of the chosen attorney's billing rate unless the rate customarily charged in that attorney's locality for truly similar services is deemed to require an adjustment."), *cert. denied*, 103 S. Ct. 2428 (1983); *Taylor v. Philips Indus.*, 593 F.2d 783, 787 (7th Cir. 1979) (affirming district court's choice of hourly rate that coincided with attorney's longstanding billing rate); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) ("The value of an attorney's time generally is reflected in his normal billing rate."). *See generally* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 198 (1981) ("The means by which the hourly rates are determined is also fairly well established. The starting point ordinarily is the normal billing rate of each attorney as reflected by affidavits submitted to the court." (citation omitted)). Indeed, this apparently is what the district court did in *Copeland*. *See Copeland v. Marshall*, 641 F.2d 880, 887-88, 902 (D.C. Cir. 1980) (en banc).

[89] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 373-74 (D.D.C. 1983).

[90] 691 F.2d 514 (D.C. Cir. 1982).

[91] *Id.* at 521 (footnote omitted).

[92] *See Blum v. Stenson*, 104 S. Ct. 1541, 1545 (1984) (issue whether New York Legal Aid Society's award of attorneys fees should be calculated on a "cost-plus" basis or on the basis of "prevailing market rates").

The approach intimated by the Supreme Court and routinely employed by this and other circuit courts best effectuates Congress's objective of attracting qualified counsel to bona fide civil rights cases. By setting the fee award at the attorney's customary billing rate, the opportunity cost of foregone representations is precisely offset by a fee award in the same amount. As one academician has explained:

> The court must determine a value for the attorney's time that will place statutory fee cases on a competitive economic basis and that will compensate attorneys in equitable fee cases for the loss sustained in creating the appropriated benefit. *For lawyers engaged in customery private practice, who at least in part charge their clients on an hourly basis regardless of the outcome, the marketplace has set that value. For these attorneys, the best evidence of the value of their time is the hourly rate which they most commonly charge their fee-paying clients for similar legal services.* This rate reflects the training, background, experience, and previously demonstrated skill of the individual attorney in relation to other lawyers in that community.
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> . . . [A] somewhat different situation is presented when the attorney does not have a customary hourly rate set by the competitive marketplace.[93]

2. Administrability, Equity, and Efficiency

Several strong policy reasons support tying the "reasonable hourly rate" to the firm's own billing rates.[94]

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[93] Berger, *supra* note 49, at 321 (emphasis added).

[94] Laffey finds anomalous the possibility that two different law firms with lawyers of similar credentials might receive different hourly rates for work on the same case. To the extent that such an anomaly exists, it mirrors the anomalous situation that would exist if the same firms were hired by a fee paying client. Moreover, that paying lawyers of the same "true value" charge different rates is no

Proceeding presumptively with the firm's own rates allows the court to avoid the essentially impossible task of selecting one rate over another from a wide range of "market" rates, it limits the power of the trial judge arbitrarily to reward or punish attorneys by setting rates virtually at will, and it allows the parties and the court to avoid a "second major litigation" over the ratemaking process. The marketplace best measures "market value"; appraisal by no other method has as much claim to veracity and objectivity.

a. The difficulty of judicial ratemaking

No satisfactory method has been devised for "reinventing" the market for attorneys' services. Setting the market value of any good or service can be a treacherous business. The volatility of the stock and commodities markets speaks eloquently of the difficulty of setting prices even for fungible goods in an efficient market; the complexity of the ratemaking procedures administered by federal regulatory agencies suggests the difficulty of constructing appropriate economic models from which to derive fair rates.

The ratemaking process must necessarily prove even more difficult where attorneys are involved. As the Supreme Court has recognized, because attorneys are not fungible no one rate would be appropriate for all.[95] Nor can the appropriate rate be set by reference to easily established factors, such as academic credentials.[96] Some

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more anomalous than the fact that paying lawyers if dissimilar credentials and "true value" charge the same rate. Inequities of one sort or the other are bound to creep in so long as judges do not perfectly assess the value of various attorneys' services; such inequities can be best minimized by tying the firm's compensation to the compensation set by the market.

[95] *Blum v. Stenson*, 104 S. Ct. 1541, 1547 n.11 (1984).

[96] The District Court made no effort to draw any correlation between the academic credentials of the Bredhoff & Kaiser attorneys—

factors which make one attorney worth more than another—such as academic credentials and years of experience—are either reducible to paper or apparent to a trial judge. But others—such as the ability to communicate with clients, efficiency, judgment, and personality—are not so easily reduced or quantified. Given the complexity of the market for legal services, setting the "true value" for an individual attorney's services promises to be neither a science nor an art, but a largely arbitrary divination.

Nor do references to the overall market provide an infallible guide to the value of a particular commodity. An investor in International Business Machines would not be content to track the price of his stock by reference only to the overall average of the New York Stock Exchange; he would want the quotation for his particular stock. Similarly, he would not likely wish to sell his stock for a price picked from among the prices of all stocks on the exchange; he would prefer to sell at the price for which his stock sold.

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which it used to justify awarding them higher rates than their co-counsel, Gilbert Feldman—and their "true value" in the market. Such correlations may not be as easy to draw as the district court opinion assumes; indeed, comparison of Martindale-Hubbell listings with billing data provided by the appellees suggests that many highly paid attorneys are lacking just the sort of resume credentials that the district court relied on so heavily. *See* R.221A, Exh. 1; Brief for Appellees, app. 1. Many of the attorneys charging high rates lacked law review or clerkship experience of the type claimed by the Bredhoff & Kaiser attorneys; others did not graduate from the "top ten" laws schools like those Laffey's lawyers attended. *See id.* The data for one firm indicated that one partner with glittering credentials and stiff billing rates nonetheless billed at slightly lower rates than a slightly younger partner lacking equivalent academic credentials. *See id.* While such data should not be taken to disparage the market value of academic credentials, it does suggest that academic credentials alone may not provide a reliable guide to an attorney's worth.

If there were a set market price[97] or if the rates clustered in a narrow range, reference to other attorneys would provide an adequate guide. But, as this case indicates and as the dissent acknowledges, the spread in "market rates" charged by firms offering similar services is a broad one.[98] In a case such as this one, which involves thousands of hours, a choice from either extreme of the spectrum would affect the ultimate fee award by hundreds of thousands of dollars.

b. Arbitrariness

If no basis exists for the figures used by the district court to set the lodestar, the entire elaborate process becomes a charade. The process merely mimics—rather than provides—mathematical objectivity. When the numbers fed into the lodestar are fundamentally arbitrary, no amount of calculation can restore objectivity. The fee setting approach becomes a complex and expensive overlay of delusive mathematical form over a process fundamentally grounded in an arbitrary assessment.[99]

So long as the result is arbitrary, it would be cheaper, simpler and easier to return to the days when the judge

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[97] At the time the "prevailing rate" terminology began to be used, it was still common for local bar associations to issue suggested or minimum fee schedules. Such schedules are now a thing of the past. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[98] Despite the sigificant number of civil rights cases tried in this circuit and the existence of a discrete legal community, the district court has been unable to construct the sort of a fee "matrix" requested by the United States. The Supreme Court in *Blum* implicitly explained why such an effort must be unsuccessful—there really is no such thing as a prevailing community rate. Creation of such a rate by fiat is a task for the Congress, and not for this court. *See* 104 S. Ct. at 1547 n.11. All we can do is simplify and make more certain—and thus make more speedy, economical, and ultimately fairer, *see supra* pp. 28-36—the fee setting process.

[99] The data processing profession has captured this problem with a phrase: "Garbage in, garbage out."

simply awarded an undivided figure that seemed fair. An examination of the district court's opinion in this case underscores how arbitrary the picking of a fee could be. The record reflected a broad range of rates for attorneys of similar experience.[100] In picking within this broad range, the district judge offered no explanation other than that he felt the Bredhoff & Kaiser lawyers to be worth it. There was no analysis of the market for legal services; there was no explanation as to why the Bredhoff & Kaiser attorneys were worth more in this case than they were in similar cases litigated at the same time.

The dissent does not defend the district court's judgment on this score. Rather than fleshing out its "true value" test for the benefit of trial courts in the future, the dissent is content to score debater's points by "nickel and diming" the guidelines we offer. In accordance with its limited ambition, the dissent does not refute the relative superiority of customary billing rates to determine the "reasonable hourly rate." The dissent concedes, in fact, that "in some, but by no means all, instances the applicant's customary billing practice will provide the 'best evidence' of the market rate." [101]

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[100] According to the dissent, the range established by prevailing community rates is virtually indeterminate. *See* dissent at 1 n.1 ("As this case demonstrates, attorneys in a given community charge a wide range of rates. . . . Thus in all but the rarest cases 'bracketing' the fee applicant's billing rate is an empty gesture . . . ."). If this were true, the dissent's formula would leave district judges at sea in their attempts to award attorneys fees in a consistent fashion. Because the dissent's approach provides little guidance for choosing the "comparable" fee within this assertedly broad range, arbitrary and inconsistent fee awards are rendered virtually inevitable. In fact, of course, the district judge should disregard abnormally high and low billing rates in determining a reasonable hourly rate, just as the score-keeper at an Olympic gymnastic event throws out the high and low scores to arrive at a consensus rating.

[101] *Id.* at 15 (citation omitted).

The dissent could have profitably stopped there, for the criticisms it offers of historical billing rates apply with even greater force to the components of the "true value" test it has chosen to defend. For example, the dissent quite correctly remarks that private sector billing rates often "depend on the nature of the service rendered, the relationship with the client, its ability to pay, or myriad other considerations." [102] But the trial court should be able to choose the billing rate for the most closely analogous service, which logically would be found among the rates charged by the claimant firm, and the range of billing rates for different clients should not be too wide (especially if the court—as it should—disregards abnormally high or low rates which may reflect the particularly attractive or distasteful nature of a matter, extraordinary time pressures, and other extraneous considerations). Whether the dissent accepts these reassurances or not, the district court's task is certainly easier when it has only one firm's rate structure to grapple with rather than that of an entire legal community. If the customary billing rates of an individual lawyer or law firm cannot provide "predictability and ease of administration," [103] the dissent's recommended open-ended inquiry into the going rate for legal services over an entire community must, a fortiori, lead to whimsical and capricious awards.[104]

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[102] *Id.* at 13.

[103] *Id.* at 12.

[104] The dissent also notes that billing rates change over time. *See id* at 13. To deal with these fluctuations, the district court should simply match the billing rate governing a particular period to the hours reasonably expended during that period. The district court need not perform this calculation if it is "[u]sing current market rates to . . . counterbalance the delay in payment" of legal fees by the losing party. *Murray v. Weinberger*, No. 83-1680, slip op. at 18 (D.C. Cir. 24 Aug. 1984).

c. Avoiding a "second major litigation"

The approach taken by the district court also conflicts with the Supreme Court's admonition to avoid engendering a "second major litigation" over the scope of attorneys fees.[105] If the court takes seriously its self-imposed mandate to fix the "true value" of attorney services, it must draw on the range of techniques used by other ratemaking agencies—voluminous records, expert testimony, elaborate economic models, and so forth. This elaborate procedure, of course, will be just the sort of protracted proceeding this court and the Supreme Court have inveighed against.

Protracted proceedings cannot be avoided by vesting broad, unreviewable discretion in the trial judge to fix rates. Vesting absolute discretion in the district court to value an attorney's services not only permits arbitrary fee awards, but also necessarily hampers accurate forecasting of what rate ultimately will prove "reasonable." So long as so much flex remains in the hourly rate, the parties—especially those whose every hour will be compensated by the other side—have little reason to settle the amount of the fee award; sheer economic self-interest mandates litigating the "reasonable hourly rate" to the bitter end. *The uncertainty would diminish, and the chance of settlement increase, if the hourly rates were set according to the established rates of those seeking compensation.*

It is easy to see that the incentives to settle are much stronger when fees are based on the prevailing firm's historical rates. The combination of documented billable hours and a predictable hourly rate yields a projected lodestar figure that the parties can expect will withstand

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[105] *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1941 (1983); *see National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1324 (D.C. Cir. 1982) (per curiam); *Copeland v. Marshall*, 641 F.2d 880, 896 (D.C. Cir. 1980) (en banc).

scrutiny. With specific enhancements limited to the exceptional case, the size of the fee award can be predicted.

The losing party has every incentive to pay a predictable fee—any reluctance to pay only generates litigation over the size of the fee award, without much change of decreasing the final award. Indeed, the losing party pays a double penalty for litigating the size of the attorneys fees, since it must pay both its own and the prevailing party's attorneys for litigating the fee award. With the magnitude of the fee award more or less apparent from the start, it is in the interest of the losing party to settle promptly and fully.

So long as the losing party behaves rationally, the winning party has little incentive to press for excessive fees. The prevailing party will not be likely to collect higher fees for the merits, and if unreasonabe in pressing its claims will not be compensated for the time spent litigating attorneys fees. The prevailing party would thus be well advised to litigate only when the losing party is being unreasonable—collecting both what is due on the merits and additional fees for the attorneys fee litigation—but settle when a reasonable settlement is offered.

Such settlements depend on the *predictability* of the size of the ultimate award. Such a fee can be predictable only when the components—the hourly rate, the hours worked, and the specified enhancements—are also predictable. By basing the hourly rate on a predictable figure, today's opinion takes a significant step toward a system where fee awards routinely will be settled.[106]

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[106] Notwithstanding the benefits of greater predictability, the dissent asserts that use of historical billing rates will give defendants less incentive to settle, because they "will benefit from the happenstance that plaintiff's counsel historically charged lower fees than those prevailing in the community." Dissent at 9. This comment ignores the fact that their opponents' attorneys fees—for

By providing a meaningful benchmark for use by trial courts, we also hope to minimize appellate intervention into disputes over fee awards. The dissent argues, rather counterintuitively, that by providing guidelines to district judges we will encourage litigants to challenge the fee setting methodology on appeal in this court.[107] We encourage no such conduct. First, by acknowledging our routine use of an attorney's customary billing rates to determine the reasonable hourly rate, we reaffirm past practice. Our adherence to precedent will not raise false hopes of successful appeals.

In contrast, it is the approach employed by the district court and defended by the dissent that gives rise to frequent appeals. Because no litigant can be sure that the fee award represents the prevailing attorney's "true value," he will have an almost irresistable incentive to seek an opportunity to convince this court that the district judge abused his discretion. Indeed, in many instances he will have a good cause for his ire: the inevitable variability and inconsistency of the "true value" approach creates an ever growing pool of litigants with genuine grievances. Rather than review an essentially unguided albeit conscientiously made guess as to the true worth of an attorney, it is preferable to articulate objective, congressionally-inspired standards in advance. Proper application by the district courts in the first instance should minimize the need for appellate review. In the words of one scholar, "a more rational and consistent approach among the courts would greatly reduce

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which they will ultimately be liable if plaintiffs' claims are adjudged valid—will increase in direct proportion to their improper refusal to settle. Moreover, if a plaintiff's lawyer charged fees higher than the going rate, as might well be the case for many private law firms litigating pro bono publico, the purported disincentive to settle would be reversed.

[107] *See id.* at 13-14 & n.13.

the existing necessity of relitigating the ground rules in each case." [108]

3. The Dissent

Although we have fully answered the dissent's objections at the appropriate points in our opinion, we feel compelled to point out two conceptual flaws which, we respectfully submit, permeate the dissent's analysis. First, in claiming that our approach contravenes the "unambiguous intent of Congress," [109] the "express admonition" of the Supreme Court,[110] and "an unbroken line of cases in this circuit,' [111] the dissent vastly overstates its case. Because our task is one of statutory construction, and because legislative history is a uniquely valuable tool in that endeavor, a closer look at the dissent's argumentation on this point provides a useful illustration.

In claiming that our construction is foreclosed by the legislative history, the dissent accurately points out that the Senate Committee Report cited three district court cases as correctly applying the "appropriate standards." [112] But the dissent's quotation from the first case, *Stanford Daily v. Zurcher*,[113] to the effect that "[t]his court does not accept the attorneys' usual billing rates as *definitively* fixing their billing rates for this litigation," [114] is beside the point because we do not consider

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[108] Berger, *supra* note 49, at 293.

[109] Dissent at 2.

[110] *Id.*

[111] *Id.* at 3.

[112] S. REP. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913.

[113] 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 537 (1978).

[114] *Id.* at 684 (emphasis added).

it *definitive* either. Indeed, the district court in the very next sentence suggested, consistent with our analysis, why such rates should be only presumptively binding: "[T]he simple fact [is] that attorneys may be leaving the area of their professional expertise in taking on pro bono publico litigation and that, as a result, their billing rates should reflect this fact." [115] Because the attorney's rates "compare[d] favorably with the rates charged by other attorneys in this area . . . [and because] these rates reflected the attorneys' expertise," the judge granted the fee request with only a minor modification.[116] A clearer example of the methodology we outline today—reference to the customary billing rate followed by comparison to the prevailing community rate to ensure that the attorney's customary rate is reasonable—could hardly be hoped for.

The dissent also cites *Swann v. Charlotte-Mecklenburg Board of Education* [117] for the proposition that "Congress did not intend to use historical billing rates as a cap on fee awards." [118] The district judge may have based his

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[115] *Id.* This passage, which applies a private firm's historical billing rate to litigation undertaken pro bono publico, answers the dissent's query as to the status of a private law firm acting in this capacity. *See* dissent at 5 n.4. Our decision in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc), also adopted the customary billing rate of a law firm working pro bono publico as the "reasonable hourly rate" for purposes of awarding attorneys fees, *see id.* at 887-88, 902, as the dissent recognizes, *see* dissent at 7 n.6.

[116] 64 F.R.D. at 685. In arriving at its fee award, the district court never considered the criteria advanced by the dissent to determine the "true value" of attorneys' services. Apparently, the judge made his calculation based solely on "affidavit[s] [submitted by plaintiff's attorneys which] . . . provide information concerning their individual billing rates for fixed-fee services." *Id.* at 684.

[117] 66 F.R.D. 483 (W.D.N.C. 1975).

[118] Dissent at 4 n.3 (citation omitted).

award on the "[f]ees paid to opposing counsel",[119] as the dissent suggests. But we will never know, because he also listed eight other factors, including such surrogates for historical billing rates as "[l]oss of other business" and "[f]ees customarily charged for similar services." [120] The mystery must remain unsolved because, after commenting casually on the eight factors, the judge concluded by saying: "Based on all the factors noted above . . . I find that plaintiffs' counsel are entitled to a fee of $175,000.00 for their services." [121] Given the conclusory manner of this congressionally-approved fee calculation, it is not surprising that the Supreme Court has rejected the dissent's implicit assumption that Congress intended the methodology of these cases to be followed closely; otherwise, the Court could not have mandated the lodestar method of fee-setting in the face of *Swann*. The dissent therefore surely overstates its case to say that this decision forbids the use of customary billing rates as presumptively reasonable hourly rates. (The third case cited in the Senate Report, *Davis v. County of Los Angeles*, concerned a "privately funded non-profit public interest law firm" for which past billing rates were unavailable.[122] That court did not reach the question we decided today.)

More fundamentally, the dissent's reasoning—that because the legislative history does not explicitly endorse the approach we adopt today that it therefore precludes it—is difficult to fathom. To begin with, our approach, by in effect setting the reasonable hourly rate at the opportunity cost of litigating civil rights claims, fully satisfies Congress's objective of encouraging meritorious litigation without awarding "windfall" fees. Even if not

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[119] 66 F.R.D. at 485.

[120] *Id.* at 486.

[121] *Id.*

[122] 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5049 (C.D. Cal. 1974).

explicity endorsed by the text of the statutes and the history of its passage, the dissent cannot logically leap to the conclusion that our construction is forbidden. The committee reports and floor debate do not explicitly endorse the "true value" formula that the dissent would affirm either. Rather than hiding behind a nonexistent congressional intent, the dissent should defend its preferred fee setting approach on the basis of its consistency with the statutory scheme and with recent pronouncements of the Supreme Court.

Second, the dissent's approach is schizophrenic. It seeks to distance itself from use of customary billing rates because it feels incompetent to "plumb the mysteries of economic analysis," [123] yet at the same time it endorses an approach that requires district judges to duplicate the free market and ascertain an attorney's "true value" by comparing his skill, experience, and reputation to lawyers who bill paying clients. The dissent is willing to *compare* fee applicants to private sector attorneys, but it is curiously unwilling to use the market rates of the attorneys themselves. The dissent's attempt to unhook the customary billing rate from both private and nonprofit law firms must founder, because the entire lodestar framework mandated by the Supreme Court makes private attorneys' hourly rates the baseline for comparison. After all, "[i]n order to establish a market value for the services of a lawyer who does not have an hourly rate set by the marketplace, it is necessary to look to the rate charged by comparable attorneys who do." [124]

The implication of this point is important. Contrary to the dissent's accusations, the approach set out above does not discriminate between private and nonprofit law firms—the inquiry is the same. For private law firms,

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[123] Dissent at 3.

[124] Berger, *supra* note 49, at 324.

the prevailing market rate for the firm's services is presumptively found in the firm's customary billing rates. For nonprofit law firms, the objective is still to determine the prevailing market rate for that firm's services; but because such firms have no past billing history, a proxy for the actual market rate of the firm's services must be found by examining the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

4. Summary

When the costs of litigating attorneys fees are unavoidable, and they may be when firms with no relevant billing histories are involved, they must be tolerated.[125] But when fixed market rates already exist, there is no good reason to tolerate the substantial costs of turning every attorneys fee case into a major ratemaking proceeding. *In almost every case, the firms' established billing rates will provide fair compensation.* The established rates represent the opportunity cost of what the firm turned away in order to take the litigation; they represent the lawyers' own assessment of the value of their time. To the extent unusual circumstances exist, those exceptional

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[125] These costs include undercompensating as well as overcompensating lawyers. The hourly rates found "reasonable" by courts have varied by a remarkable degree. *See supra* pp. 14-16. *Compare King v. New Hampshire Dep't of Resources and Economic Dev.*, 562 F.2d 80, 83-84 (1st Cir. 1977) (Coffin, J.) (fee award averaging $11 per hour upheld as reasonable), *with Wehr v. Burroughs Corp.*, 477 F. Supp. 1012, 1023 app. A. (W.D. Pa.) (fees up to $125 per hour approved), *aff'd as modified*, 619 F.2d 276 (3d Cir. 1980). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1501 (1983) ("Hourly rates vary dramatically." (footnote omitted)); *id.* at 1501-03 n.61 (citing cases). The reported cases indicate that many courts award fees that are below the attorney's normal hourly rates. In this circuit, the United States Attorney has resisted paying more than $75 per hour to any attorney, regardless of that attorney's normal billing rate.

circumstances are best taken into account in adjustments of the lodestar.

The trial court here improperly based the hourly rates on its own unguided assessment of the "true value" of the attorneys' services. The proper approach is simpler and less arbitrary, as we have set forth above, and which may be summarized: The party seeking compensation should provide evidence of the rates charged by the firm for performing similar work in private representations. As the Supreme Court said in *Blum*, "the critical inquiry in determining reasonableness is . . . the appropriate hourly rate. And the rates charged in private representations may afford relevant comparisons." [126] When the firm has been engaged "in private representation," as Bredhoff & Kaiser has been, we can think of no more "relevant comparison" that "the rates charged in private representation" by Bredhoff & Kaiser itself. Next, the court may then "bracket" this rate by establishing that it falls within the rates charged by other firms for similar work in the same community. Again, as Justice Powell said in *Blum* (in the context of determining a non-commercial rate), "the burden is on the fee applicant to produce satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." [127] *So long as the firm's own rate falls within the rate brackets, it is the market rate* for the purposes of calculating the lodestar. Any adjustments or enhancements should be made during the "subjective" phase of the fee setting procedure, using the guidelines set forth in *Hensley* and *Blum*.[128] Such

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[126] *Blum v. Stenson*, 104 S. Ct. 1541, 1547 & n.11 (1984).

[127] *Id.*

[128] Laffey cross-appeals, seeking to have the issue of enhancement of the lodestar remanded if the hourly rates are reduced. In *Blum* the Supreme Court held that an upward adjustment for quality may

adjustments should be made only for exceptional circumstances, and should be carefully and precisely explained.

The above approach is in complete accord with the congressional objective as interpreted by the Supreme Court. The hourly rates Bredhoff & Kaiser lawyers were happily receiving from other clients were surely "adequate to attract" them to this litigation; substantially more, as was granted by the trial court here, would produce the very windfall Congress and the Supreme Court have said should be avoided.[129] Because the district court applied an incorrect legal standard in that it relied not at all on the past billing histories of the law firms representing the prevailing plaintiffs, and instead attempted to assess the "true value" of their services, we must reverse and remand.

B. *Allotment of Tasks*

The appellants also object to the allotment of tasks between partners, associates, and paralegals. They object

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be justified "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 1549. In this case, there simply was no specific evidence that plaintiffs' counsel provided services that were "superior" to those services provided at the firms' normal rates. In addition, the trial judge expressly found that "[t]he case . . . simply was not 'exceptional' as that term has been defined by the Court of Appeals.' *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 377 (D.D.C. 1983). Therefore, *the district judge has already found* that under the controlling law established by *Blum* plaintiffs' counsel do not qualify for a "quality" multiplier.

[129] And give added endorsement to the famous description by Lord Denning M.R. of the attorney fee system in the United States: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side." *Smith Kline & French Laboratories Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (C.A. 1972).

that the fees have artificially been elevated because partners have performed many tasks that would have been performed by associates at other law firms.[130] The crux of their argument is that setting the "true value" of a firm's services requires an analysis somewhat more probing than looking merely to the hourly rates; it requires an analysis of the firm's staffing patterns. The analysis requested is not far different from that which a sophisticated client—who recognizes that the lowest hourly rate will not always generate the lowest overall bill—would make in an arm's length negotiation.

If this court were to adopt the approach followed by the district court, there would be some merit to this argument. Hourly rates—whether for lawyers or for steelworkers—are to some degree a function of productivity. Productivity, for lawyers and steelworks alike, reflects both individual efficiency and capital investment. Some lawyers are simply more efficient than others; others are more productive because sophisticated support systems allow them to produce more in less time than other lawyers without such support. Given that the level of support could affect the productivity of two lawyers of equal ability, a "true value" analysis of a firm's worth would have to include examination of the factors affecting productivity in the firm's structure. The same lawyer might have an equal value on a *per case* basis whether as a single practitioner with one secretary or in a large firm supported by legal associates, paralegals, a battery of secretaries, word processing equipment and automated legal research tools. However, that same lawyer would obviously be worth much more *per hour* if he were working in a large firm supported by every conceivable human and electronic aid than as a solitary practitioner with minimum assistance.

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[130] Brief of Northwest Airlines, Inc. at 46-51.

Experienced partners, for example, are generally considered most productive when their time is spent supervising less experienced attorneys. In this case, however, nearly two-thirds of the hours billed were billed by partners. This indicates that the lower priced—if equally talented—partners here did work that would not have been done by partners at a more highly leveraged firm. A private client would take such factors into account in comparing fees. A court setting a "true value" on a firm's services would be obligated to consider such factors —and they are almost infinite in their variability—in constructing the ideal fee package for the firm.

However, *by deferring to the market we have obviated the need to set a "true" staffing pattern to go along with a "true value" set on the firm's services.* The record indicates that Bredhoff & Kaiser staffed this case much as it would a case for a paying client. The market has found Bredhoff & Kaiser's staffing patterns—combined with their normal hourly rates—to produce an overall bill in accord with their market value. This market-tested allotment of both tasks and fees is not to be questioned by this court so long as it is reasonable.

C. *Contingency Adjustment*

The trial court doubled the lodestar on the merits to account for a "risk factor." Northwest argues that this adjustment was unwarranted.[131]

1. Contingency Multiplier

The appellants characterize the contingency award as reflecting only the odds at the outset of the case. They claim that "[t]he district judge reasoned that, because he believed that plaintiffs' chance of success at the outset of the litigation was 50%, a doubling of the lodestar was mathematically necessary to account for the coun-

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[131] *See id.* at 52-62.

sel's risk." [132] Under this approach, the contingency multiplier represents simply the inverse of the risk factor.

Such an approach is presumably based on a goal of making "fee award cases as attractive to lawyers as their 'usual' cases." Taken to its logical extreme, such an approach would engender results which would be at odds with current practice. For

> if the plaintiff's chance of success was less than one-half, the fee would be multiplied by a factor greater than two. In theory, there should be no upper limit to this process: when the chance of success was one in fifty, the fee should be multiplied by fifty, and so forth. But commentators and courts have not gone this far.[133]

Other consequences of this approach lead to graver criticisms. The award would be greatest when the losing party was most unreasonable in litigating its case, creating a perverse penalty for those least culpable.[134] In most cases the chances of winning could not be set with anything approaching mathematical precision, and so vast increases in attorneys would derive from a spurious mathematical base.[135] Even if the chances of winning could be precisely assessed, moreover, the net effect of such a system would be to make a marginal case as attractive to bring as a very strong case—leading, one commentator has speculated, to a situation in which every conceivable claim would be litigated, subject only to the ability of the courts to handle the burden.[136] If the ca-

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[132] *Id.* at 52.

[133] Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 481 (1981) (footnotes omitted).

[134] *See Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983); Leubsdorf, *supra* note 133, at 488-90.

[135] *See* Leubsdorf, *supra* note 133, at 485-88.

[136] *See id.* at 491-93, 499.

pacity of the judicial system remained constant, these marginal claims would displace civil rights cases with a greater probability of success. The net effect would be a dilution in the deterrent force of the civil rights statutes.

Had the trial judge applied such a crude multiplier, he clearly would have misapplied the controlling law. The statute allows awards only to prevailing parties. To multiply all awards to account for the risk of losing would ultimately generate a pool of legal fees sufficient to compensate all attorneys bringing all civil rights suits; the fund generated would differ from insurance only in the manner in which it was collected and distributed.[137] While such a scheme is arguably desirable, it clearly is not the one adopted by Congress.[138]

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[137] *See Murray v. Weinberger*, No. 83-1680, slip op. at 13-14 (D.C. Cir. 24 Aug. 1934). It perhaps bears noting that a multiplier approach would be far less fair in its distributional effects than an insurance system. Bringing a promising claim that loses would yield no compensation to the attorney; bringing a near-frivolous claim that wins would yield exceptionally high attorneys fees to the prevaling party. The net effect is a small transfer of wealth from the least reasonable losing parties to the least reasonable prevailing parties, and a substantial transfer of wealth from the most reasonable losing parties to the least reasonable prevailing parties. There is no reason to assume that the distributive effects would average out over time.

[138] The Court [in *Blum*] raised a further question, however, of "whether the risk of not being the prevaling [sic] party . . . may ever justify an upward adjustment." [*Blum v. Stenson*, 104 S. Ct. 1541, 1550 n.17 (1984).] This question is perceptive; it focuses attention on the intent of the Fees Act. Only "prevailing parties" are to qualify for a "reasonable fee" in the first place. This "prevailing" threshold was the mechanism chosen by Congress to deter meritless litigation. Supplying a bonus for accepting marginal or risky cases would certainly be at odds with this policy. In fact, a contingency bonus could attract competent counsel away from prosecuting clear violations of rights in favor of cases with a higher potential award. If the contingency argument is based on the notion that fees

The Supreme Court has emphasized the congressional intent to award fees only to prevailing plaintiffs. In *Hensley* the Court ruled that no attorneys fees could be granted for claims unrelated to those for which relief was granted. The Court reasoned that "[t]he congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." [139] The Court later added that "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill." [140]

The same logic which restricts compensation to those portions of a lawsuit directly related to the relief procured also forbids multiplying attorneys fees so as effectively to compensate counsel for other, losing claims which may be brought. The prevailing party may expect full compensation for prevailing claims; there is no provision for compensating losing, unrelated claims in the same case, or other losing cases which might or might not involve the same parties. Any crude multiplier derived simply from the plaintiff's chance of success must be rejected as contrary to the congressional scheme.

> in this risky case may offset expenses of other unsuccessful suits, the problem of encouraging marginal litigation is compounded by the reasonable question of "why the subsidy [for unsuccessful litigation] should come from the defendant in another case."

Address by Randall Rader, Second Institute on Federal Civil Procedure (Houston, Tex. May 1984) (unpublished manuscript entitled *The Fee Awards Act of 1976: Examing the Foundation for Legislative Reform of Attorney Fees Shifting* 27) (footnotes omitted) (second quotation from Leubsdorf, *supra* note 133, at 489).

[139] 103 S. Ct. 1933, 1940 (1983) (footnote omitted).

[140] *Id.* at 1941.

2. Contingency Enhancement

Laffey argues, however, that the district court employed a more sophisticated analysis than simply assessing the plaintiffs' initial chance of success. Laffey characterizes the relevant inquiry as looking not only to the initial outlook for success, but also to the magnitude of what was placed at risk. Under this more complex analysis, Laffey argues, the trial judge found that a doubling of the merits lodestar was required to compensate the plaintiffs fully in this particular case. In effect, Laffey argues, given the uncertainty of prevailing (and hence receiving payment) and the prospect of large outlays of time and money, a rational lawyer would expect twice the going rate to account for that uncertainty.[141]

Although a contingency *multiplier* would fully subsidize unsuccessful suits and encourage the filing of nonmeritorious claims, both effects in contravention of the statute's purpose and the Supreme Court's decision in *Hensley*, the propriety of an *enhancement* to the award is less clear. In *Stanford Daily v. Zurcher* [142]—which was cited by the Senate Committee Report as "correctly appl[ying]" the "appropriate standards" [143]—the court held that it "[c]learly . . . must increase the fees award . . . to reflect the fact that the attorneys' compensation, at least in part, was contingent in nature." [144] But the court's reason for making this adjustment was that "the contingent fee insures that counsel are compensated not only for their successful efforts but also for unsuccessful litigation. . . . [O]ver the long run, substantial fees

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[141] Brief for Appellees at 50-68.

[142] 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 537 (1978).

[143] S. REP. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912.

[144] 64 F.R.D. at 686, *see supra* p. 17 & n.64.

awards in successful cases will provide full and fair compensation for all legal services rendered to all clients." [145]

Obviously, the California district court's reasoning flatly contradicts the Supreme Court's holding in *Hensley* that unsuccessful counts (and suits) do not qualify for an award of attorneys fees under the Act. In *Blum*, decided this Term, the Court made the propriety of contingency enhancements ever more suspect by reserving the question in such a way as to indicate that it had grave doubts as to whether such adjustments should ever be made: "We have no occasion in this case to consider whether the risk of not being the prevailing party . . . may *ever* justify an upward fee adjustment." [146]

Regardless whether contingency enhancements are ever warranted, it is clear in this case that a showing sufficient to qualify plaintiffs' counsel for an enhancement cannot be made. The Supreme Court and this court have made it clear that "enhancements" are to be awarded only in the exceptional case. The *Blum* Court, immediately after refraining from deciding whether contingency adjustments would be appropriate because the issue was not raised in the fee request, did "reiterate what was said in *Hensley*," that "in some cases of *exceptional* success an enhancement award *may* be justified." [147] Following the Supreme Court's suggestion, this court applied "[t]he principle that only rare and exceptional circumstances can justify an upward adjustment of the lodestar" [148] to an enhancement made to reflect "the con-

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[145] *Id.* at 685.

[146] 104 S. Ct. 1541, 1550 n.17 (1984).

[147] *Id.* at 1550 (quoting *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1940 (1983)) (emphasis added).

[148] *Murray v. Weinberger*, No. 83-1680, slip op. at 8 (D.C. Cir. 24 Aug. 1984).

tingency of payment due to the risk of losing on the merits." [149]

In this case, the district court applied an erroneous legal standard when it assumed that plaintiffs' counsel were "*entitled*" [150] to a contingency enhancement. As we stated only last month in *Murray v. Weinberger*, "an upward fee adjustment to compensate for the risk of losing—if ever appropriate (and *Blum* did not decide that it ever would be appropriate)—is permissible only in an exceptional case." [151] Whatever the Supreme Court meant by the term "exceptional," this case does not fall within its embrace. The district court found that the plaintiffs' initial chance of success was 50 percent.[152] *That chance*

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[149] *Id.* at 4; *see id.* at 16.

The dissent's reading of *Blum* to say that contingency adjustments are appropriate in cases that are not exceptional is simply not the law of this circuit (as well as being an erroneous interpretation of *Blum*, we believe). *See id.* at 16. Even before this court's decision in *Murray*, it would have been incorrect to sanction the routine award of contingency enhancements. In *Copeland* we observed that "an hourly rate underlying the 'lodestar' fee itself" may "comprehend[] an allowance for the contingent nature of the availability of fees." 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc). The lodestar figure may therefore inherently include an adjustment for the possibility of not prevailing on the merits, *see Murray v. Weinberger*, No. 83-1680, slip op. at 15; *Copeland v. Marshall*, 641 F.2d at 917-19 (Wilkey, J., dissenting), despite the diligent efforts of district judges to separate the two, *see National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1328 (D.C. Cir. 1982) (per curiam).

[150] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 378 (D.D.C. 1983).

[151] No. 83-1680, slip op. at 16 (D.C. Cir. 24 Aug. 1984). We remanded in *Murray* because, on the record in that litigation, the district court was not foreclosed from finding that case to be "exceptional" within the meaning of *Blum*. In this case, however, the trial court's factual findings indicate that this is *not* an exceptional case. The judge's findings in this regard are not an abuse of discretion.

[152] 572 F. Supp. at 379.

of winning reflects the norm for litigated cases—in the average case, one side will win, one will lose. *The level of risk was not unusual.* Since this case did not present an exceptional level of risk, no risk enhancement should be awarded.

D. *Attorneys Fee Litigation*

Northwest objects to the magnitude of the award for litigating the attorneys fee issue. In addition to various specific objections, Northwest notes that more attorneys worked on the fee request than ever worked on the merits, and that more hours were billed on the fee request than were billed in any given year on the merits.[153]

We are, quite frankly, aghast at the hours devoted to the fee request. The award of fees for 3,400 hours of attorney time shows clearly that this fee request did turn into just the sort of "second major litigation" feared by both this and the Supreme Court; the prodigious consumption of lawyers' hours and judicial time should give pause to anyone concerned with the allocation of legal resources. And it is for this reason, aside from the fact that it is basically fair to all concerned, that we have settled on the fee per hour customarily charged for similar work by the law firm making the claim as the most objective market rate and simplest for the court to administer.

At the same time, we cannot say that the district court erred. Northwest objects to three major components of the fee award—the hours spent preparing an affidavit reciting the history of the case, time spent on interfirm meetings between the two firms involved in the fee request, and time spent in pre-application discovery.

The trial court adequately addressed each of these issues. The judge specifically noted that the lengthy

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[153] Brief of Northwest Airlines, Inc. at 13, 64-65.

affidavit recounting the case was useful in his disposition of the fee request; [154] he excluded those hours he felt were the result of unnecessary duplication caused by the entry of another firm into the case; [155] and he examined the hours spent in discovery for reasonableness.[156] His assessment of what constituted reasonable litigation of the attorneys fee issue, while perhaps more generous than this court might find appropriate on *de novo* review, does not constitute an abuse of discretion.

E. *Out-of-Pocket Expenses*

Appellants also challenge the award of certain litigation costs to the appellees. The gist of the appellant's argument is that only taxable costs may be awarded in addition to fees calculated with regard to the hourly rate.[157]

This interpretation is overly narrow. The compensation structure employed by most firms encompasses more than hours billed; various expenses incurred by the firm are passed through to clients. As several other courts have held, "[t]he authority granted in section 1988 to award a 'reasonable attorney's fee' included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." [158]

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[154] 572 F. Supp. at 368.

[155] *Id.* at 369.

[156] *Id.* at 370-71.

[157] Brief of Northwest Airlines, Inc. at 72-75.

[158] *Northcross v. Board of Educ.*, 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

Since private, for-profit attorneys are involved, this court need not attempt to trace an unwavering line between those out-of-pocket expenses which are compensable and those which are not. The line of division—as with the hourly rate—should fall where the market has placed it. Some law firms routinely pass such costs on; others charge slightly higher fees and absorb these costs. It would grant a windfall to attorneys to reimburse them for expenses which normally are absorbed as part of their overhead; it would penalize them to deny compensation for expenses which they expect to pass directly to clients. The appellees are entitled to these costs upon a showing that such costs are of a type passed on by the firms involved to private clients.

One exception exists to this general rule—those costs incurred by plaintiff Laffey herself in the course of litigating this lawsuit. These expenses are not of a type which might be subsumed in legal fees; they were absorbed directly by plaintiff Laffey. The legislative record shows beyond doubt that prevailing plaintiffs should be compensated for reasonable expenses incurred in litigating their claim. The costs incurred by Laffey herself are therefore compensable.

The lost wages suffered by Laffey are no different in this respect from her actual out-of-pocket expenses. Her lost income effectively "paid" someone else to take her place so that she could pursue the litigation; not to compensate her for these costs might force her to choose between pursuing a Pyrrhic victory and foregoing a valid claim. This is precisely the dilemma from which Congress sought to free prospective plaintiffs.

III. Conclusion

The district court erred in basing the hourly rates on the putative "true value" of the firms involved, rather than on those firms' market tested rates. The fee award

must be recalculated according to the market rates established by those firms in their everyday practice. On the facts of this case no enhancements of those market rates are warranted. For those two major readjustments the case must be remanded. In all other respects, the district court's opinion is affirmed.

So Ordered.

WRIGHT, *Circuit Judge, dissenting*: The majority finds error in two aspects of the District Court's award of attorney fees pursuant to 42 U.S.C. § 2000(e)-5k (1982) and 29 U.S.C. § 216(b) (1982). First, drawing a sharp line between private and nonprofit law offices, the court concludes that, for the former, historical billing rates are virtually determinative[1] of the "reasonable hourly rate" component of the lodestar calculation required by *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*). Second, the majority finds, despite the carefully reasoned and meticulously documented opinion of Chief Judge Aubrey E. Robinson, Jr., *see Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), that the District Court abused its discretion in doubling the lodestar figure to account for the significant risk incurred by plaintiffs' attorneys of not prevailing and thus not recovering a fee.

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[1] The majority describes the methodology it adopts as "tying the 'reasonable hourly rate' to the firm's own billing rates." Majority opinion (maj. op.) at 28. At the last minute, however, the court steps back from holding that a private attorney's billing rate conclusively determines the maximum rate allowable for a fee award. Having determined the rates charged in private representation, the District Court "may then 'bracket' this rate by establishing that it falls within rates charged by other firms for similar work in the same community. * * * *So long as the firm's own rate falls within the rate brackets, it is the market rate.*" Maj. op. at 42 (emphasis in original). As a practical matter, however, it makes little difference whether the private billing rate is conclusive or merely is presumptively determinative of the market rate. As this case demonstrates, attorneys in a given community charge a wide range of rates. Almost invariably, the defendant will be able to find at least one private firm in the community that charges a lower rate than the fee applicant for similar work. Thus in all but the rarest cases "bracketing" the fee applicant's billing rate is an empty gesture that will yield results no different from conclusively setting the reasonable hourly rate as equivalent to the firm's historical billing rate.

In my judgment, neither conclusion is warranted under existing law. Given the unambiguous intent of Congress, recent pronouncements by the Supreme Court, and the controlling precedent in this circuit, there is simply no room for the majority's view that the amount of the fee award should turn on the nature of the practice the lawyer has chosen to follow rather than the customary fee prevailing in the community for lawyers of comparable skill, reputation, and experience. Nor can I agree that the District Court erred in its calculation of a contingency multiplier. The legislative history of the relevant attorney fees acts and the *en banc* decision in *Copeland, supra*, preclude the view that increasing the award to account for the risk of non-success constitutes an error of law. *See also Blum v. Stenson*, —— U.S. ——, ——, 104 S.Ct. 1541, 1550 (1984) (Brennan, J. concurring). (Supreme Court decisions not yet appearing in U.S. Reports will hereinafter be cited only to Supreme Court Reporter.) Thus reversal is appropriate only if we can find that the District Court abused its discretion. *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1941 (1983) (opinion by Powell, J.); *Copeland, supra*, 641 F.2d at 901. Yet, presumably because the thoroughness of the District Court's opinion makes the task all but impossible, the majority makes no serious effort to justify its finding of abuse of discretion. Instead, under the guise of applying the appropriately deferential standard of review, the majority substitutes its judgment for that of the District Court. This approach not only disregards the clear mandate of the *en banc* decision in *Copeland*, but also, contrary to the Supreme Court's express admonition to avoid engendering a "second major litigation" over attorney's fees, *Hensley, supra*, 103 S.Ct. at 1941, serves to encourage disappointed fee litigants to persist in pursuing their claims in this court. Accordingly, I dissent.

I

A

Buoyed by its confidence in the inevitable beneficence and efficiency of the free market's "invisible hand," the majority holds that the District Court erred in awarding fees at variance with those charged other clients in private litigation. I agree that the appropriate inquiry is to determine the prevailing market rate for complex federal litigation. *Blum v. Stenson*, *supra*, 104 S.Ct. at 1547 n.11. I need not, however, plumb the mysteries of economic analysis to evaluate the validity of the majority's view that the historical billing rate of a private law firm necessarily corresponds with the market value of its services. In my judgment, the analysis adopted by the majority is expressly foreclosed by the legislative history of the attorney fees acts, Supreme Court precedent construing those acts, and an unbroken line of cases in this circuit.

The task of determining the appropriate methodology for evaluating the reasonableness of fee awards "begins and ends with an interpretation of the attorney's fees statute." *Blum*, *supra*, 104 S.Ct. at 1546. Congress has made clear its intention that the same standards govern under all of the myriad statutes permitting the award of attorney fees to prevailing parties.[2] *See*, *e.g.*, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1, 6 (1976) (hereinafter cited as *Senate Report*) (42 U.S.C. § 1988 adopted to achieve consistency in attorney fees provisions of civil rights laws); *Hensley*, *supra*, 103 S.Ct. at 1939 n.7; *Jordan v. U.S. Dep't of Justice*, 691 F.2d 514, 523 n.89 (D.C. Cir. 1982). Yet the legislative history of *none* of the attorney fees statutes offers support for the ma-

[2] *See* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 301-302 (1981) (listing 54 federal statutes authorizing award of attorney's fees).

jority's conclusion that a private attorney's historical billing rate is presumptively congruent with the market value of his services. Indeed the legislative history clearly negates precisely the analysis the majority today adopts. In enacting the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), Congress indicated that "[t]he appropriate standards [for measuring the reasonableness of attorney fees] * * * are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) * * *." *Senate Report* at 6. In *Stanford Daily* the court, in determining the appropriate fee award to a *private* attorney, explicitly stated, "*This court does not accept the attorneys' usual billing rates as definitively fixing their billing rates for this litigation.*" 64 F.R.D. at 684 (emphasis added).[3]

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[3] The *Senate Report* also cited *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D. N.C. 1975), as applying the correct methodology. In *Swann* the court, in determining the amount of the fee award, looked to the rate charged by opposing counsel. *Id.* at 485. Like *Stanford Daily*, *Swann* makes clear that Congress did not intend to use historical billing rates as a cap on fee awards. E. LARSON, *supra* note 2, at 196.

The majority's reading of *Stanford Daily* to support its holding, maj. op. at 37-38, requires the use of mirrors. The *Stanford Daily* court—consistent with the approach adopted in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*), applied by the District Court in this case and endorsed in this dissent—looked at the historical billing rates of the private attorney and concluded that they conformed to the customary rate prevailing in the community. It did not suggest that the billing rate was dispositive provided only that some attorney somewhere could be found who charged more than that fee and some attorney somewhere could be found who charged less. No such mechanical and artificial "bracketing" was applied. Indeed, the court took pains to explain that the billing rates of the private attorney were the appropriate yardstick only because they "compare favorably with the rates charged by other attorneys in this area for work involving complex questions of fact and law." 64 F.R.D. at 685. To defend its strained reading of the case, the majority must seize on the word "definitively" in the statement in *Stanford Daily* that "[t]his court does not accept

Nor will the legislative history support the majority's view that Congress endorsed a different calculus for measuring the reasonableness of attorney fees depending on whether counsel is a public interest lawyer or is in private practice.[4] As the Supreme Court unambiguously found in *Blum, supra*, "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a

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the attorneys' usual billing rates as definitively fixing their billing rates for this litigation." *Id.* at 684. As argued earlier, *see* note 1 *supra*, there is no meaningful distinction in practice between "presumptively" conclusive and "definitively" conclusive.

The majority misreads this dissent to suggest that "because the legislative history does not endorse the approach we adopt today that it therefore precludes it." Maj. op. at 39. By incorporating by reference the methodology of the cases cited in *Senate Report*, Congress revealed its intent that historical billing rates not unilaterally determine reasonable hourly rates in civil rights attorney fee awards. Relying on a transparently empty distinction between "presumptively" and "definitively" conclusive, the majority today adopts a methodology directly at odds with that intent. I cannot say it more plainly.

[4] Applying a different methodology depending on whether the fee applicant can be characterized as a private lawyer with regular billing rates, maj. op. at 40-41, is troubling for other reasons in addition to the plain incompatibility of this approach with the congressional design. First, the District Court will often face a difficult definitional problem. The status of the private attorney acting *pro bono publico*, for example, is not clear. Second, the majority's methodology will often generate anomalous results. It is entirely conceivable that the rate awarded a first year lawyer at a Legal Aid office would exceed that awarded to a vastly more experienced attorney whose practice, though private, was deliberately geared towards low paying clients. Indeed, the majority's disposition seems to assure precisely this result. In *Blum v. Stenson*, 104 S.Ct. 1541, 1544 n.4 (1984), the Supreme Court upheld a reasonable hourly rate of $105 per hour to a Legal Aid lawyer with one and a half years of litigating experience. This amount appears to exceed the average fee for Bredhoff & Kaiser *partners* with vastly more extensive experience. Brief for appellees at Appendix B. Congress did not intend such an incongruous result.

nonprofit legal services organization." 104 S.Ct. at 1547. For all attorneys, whatever the nature of their practice, the District Court's task is to determine whether the "requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 1547 n.11. *See also Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974) (cited in *Senate Report* at 6 as applying the appropriate standard). While the rates charged in private representations "may afford relevant comparisons," *Blum, supra*, 104 S.Ct. at 1547 n.11, the billing practice of the law office is merely one component in an otherwise essentially objective calculation. In many instances rates charged private clients will serve an evidentiary function of substantiating or rebutting other evidence adduced in the fee request, and thus will be a valuable indicator of prevailing rates in the community. *Blum* and the legislative history, however, quite simply leave no room for the conclusion that the District Court commits an error of law by awarding attorneys fees that are at variance with fees charged by the private attorney in other litigation.

I readily acknowledge, as has the Supreme Court, that the determination of the market rate is "inherently difficult." *Id.* Perhaps also, though I have my doubts,[5] the methodology proposed by the majority is simpler and more administrable than that envisioned by Congress. But that, of course, is irrelevant given the clarity of the congressional design. In my judgment, "[t]he Court has simply fixed upon what it believes to be good policy and then patched together a rationale as best it could." *Washington Metropolitan Area Transit Authority v. Johnson*, 104 S.Ct. 2827, 2837 (1984) (Rehnquist, J., dissenting). Indeed, had Congress intended so straightforward an approach as equating market rates with historical billing

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[5] *See* text at 11-14 *infra*.

rates, it would have said so. That it did not is itself a strong indication that a law office's billing practice is to be but one consideration among many in the required calculation.

In an effort to align its policy judgment with the legislative history, the majority notes that Congress explicitly admonished courts to guard against fee awards that "produce windfalls to attorneys." *Senate Report* at 6. To award appellees a fee in excess of that charged other clients in private practice, the majority concludes, would constitute just such a windfall. Maj. op. at 23. Whatever its appeal in the abstract, this reasoning was expressly rejected both by the Supreme Court and by this court sitting *en banc*. In *Blum* the Court brushed aside the suggestion that the correct fee for a Legal Aid office is the cost of rendering the service plus a reasonable profit. 104 S.Ct. at 1546 n.6. The appropriate rate for Legal Aid attorneys, no different from those in private practice, is that "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 1547 n.11. Even if application of the standard yields income in excess of that ordinarily received by the law office, this result cannot be "viewed as the kind of 'windfall profits' [Congress] expressly intended to prohibit." *Id.* at 1547.

Copeland v. Marshall, *supra*, 641 F.2d 880 (*en banc*), a case involving a *private* law firm,* makes this point with even greater clarity. The court observed that "paying low-salaried attorneys the prevailing market rate normally will yield a larger fee than that to which they are accustomed," but found "no flaw" in this result. *Id.* at 899. In fact, the court concluded, computing fees "differently depending on the identity of the successful plaintiff's attorney" would produce a windfall for the

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* *Copeland* involved the fee request of a private firm acting *pro bono publico*. 641 F.2d at 882 n.1.

defendant. Id. In many instances the incentive of the employers not to discriminate would be diminished if fee awards are made to turn on the nature of plaintiff's counsel's practice. *Id.* Moreover, the defendant is "subject to a lesser incentive to settle a suit without litigation than would be the case if a high-priced private firm undertook plaintiff's representation." *Id.*[7]

Though the juxtaposition in the above quoted passage is between the "private" and a "public interest" firm, the reasoning is wholly applicable to the case of a private firm whose lower rates reflect "personal professional interests and the ability of [its] clients to pay." *Nat'l Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982) (*per curiam*).[8] No less

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[7] The majority argues that under the methodology it adopts the parties will have a greater incentive to settle because the reasonable hourly rate will be more predictable. Maj. op. at 34-35. As discussed in text at 11-14, I have little confidence that setting fees according to historical billing rates will be any more predictable than the current approach. In any event, even more important than providing an incentive to settle on the amount of attorney fees *after* liability for a civil rights violation has been established is the statutory objective of encouraging potential defendants to cease violating civil rights in the first place. *Copeland* recognizes that the prospects of accomplishing the latter goal decrease significantly if the potential defendant assumes that the costs of continuing its course of action and defending the civil rights suit will be less simply by virtue of the nature of the practice plaintiff's private counsel has chosen to pursue.

[8] Repeatedly, this court has recognized that some attorneys bill at rates below those obtainable in the market because their clients serve the public interest. *Nat'l Treasury Employees Union v. Nixon*, 521 F.2d 317, 322 (D.C. Cir. 1975) (Wilkey J., writing for a unanimous court); *Sierra Club v. Gorsuch*, 684 F.2d 972, 975 (D.C. Cir. 1982), *rev'd on other grounds sub nom. Ruckelshaus v. Sierra Club*, 103 S.Ct. 3274 (1983). Nonetheless, the majority concludes that weighing this consideration in the fee calculation is inappropriate because it "invites courts to reward those plaintiffs who represent causes the judge involved finds estimable." Maj. op. at 19 n.69 (emphasis deleted). But this argument assumes its own conclusion. The trial court's task is not to weigh which causes it

than when the plaintiff is represented by a public interest firm, the defendant's incentive to cease discriminating or settle will be proportionally less if he knows he will benefit from the happenstance that plaintiff's counsel historically charged lower fees than those prevailing in the community.

Indeed, in case after case in this circuit the court has given short shrift to the connected arguments that a bright line separates public interest and private law firms, and that, for the latter, the market rate presumptively is tied to the historical billing rate. The majority's adoption of these twin propositions in the teeth of an unbroken line of contrary precedent is, to say the least, startling. In *Nat'l Treasury Employees Union v. Nixon*, 521 F.2d 317, 322-323 (D.C. Cir. 1975) (Wilkey, J., writing for a unanimous court), the court noted that where private counsel "serve organizations for compensation below that obtainable in the market because they believe the organizations further the public interest," upward adjustments in the attorney's billing rate are necessary to align the compensation with its reasonable market value.[9] *See also Nat'l Ass'n of Concerned Veterans v. Secretary of Defense, supra*, 675 F.2d at 1326 (where counsel customarily exercises billing judgment by not billing at the market rate, this factor must be considered in calculating appropriate rate). Similarly, in *Sierra Club v. Gorsuch*, 684 F.2d 972, 975 (D.C. Cir. 1982) (*per curiam*), *rev'd on other grounds sub nom. Ruckels-*

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finds deserving but objectively to determine the rate prevailing in the community for similar services. If the court finds a differential between the firm's billing rate and the prevailing rate, it may reflect the firm's choice to bill its public interest clients below market rates. But at no point in the calculation is the court asked to pass on whether it approves or disapproves of the causes the firm has chosen to represent.

[9] The organization referred to in *National Treasury Employees*, as in the instant case, was a union.

haus v. Sierra Club, 103 S.Ct. 3274 (1983),[10] this court observed that *no* evidence of historical billing rates to private clients had been submitted to support the fee re-

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[10] The majority labors mightily to distinguish away the line of precedent in this circuit that unambiguously conflicts with its approach. Maj. op. at 20-22 n.69. The decisions, however, simply will not support the majority's strained reading.

In *Sierra Club v. Gorsuch*, *supra* note 8, 684 F.2d at 975, the court did not even require a private lawyer to submit records of his historical billing practice. The majority dismisses this clear refutation of its methodology on the ground that the attorney had no "established billing practice." Maj. op. at 20 n.69. One searches the opinion in vain for documentation of this point. In fact, the attorney had an extensive private practice "representing primarily environmental organizations and Indian tribes before state and federal courts." 684 F.2d at 975. Nothing in the opinion suggests the absence of an established billing practice. Given the holding in *Gorsuch* that submissions of billing rates of private attorneys are not required, I simply do not understand how the majority can hold *as a matter of law* that historical billing rates are presumptively conclusive of the reasonable hourly rate.

The majority's treatment of *Nat'l Treasury Employees Union v. Nixon*, *supra* note 8, is equally unconvincing. That the award in *National Treasury Employees* was not pursuant to a statute is entirely irrelevant. It is an undisputed truism to suggest that the legislative history of the statutes relevant to this case reveals Congress' intent to avoid "windfalls" for attorneys. In its numerous invocations of that phrase, however, the majority entirely fails to mention the Supreme Court's crystal-clear holding that *paying attorneys more than their usual rate is not the kind of "windfall" Congress intended to preclude. Blum v. Stenson*, *supra* note 4, 104 S.Ct. at 1547.

The majority's reading of *Nat'l Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982) (*per curiam*), to support its holding requires a remarkable feat of interpretive sleight-of-hand. In *Concerned Veterans* the court listed numerous evidentiary sources the District Court may look to in establishing the prevailing community rate, including rates charged by other lawyers in comparable cases and recent fee awards by courts. Historical billing rates "*may* provide important substantiating evidence." *Id.* at 1326 (emphasis added). But the case simply does

quest, but found such submissions unnecessary where the private attorney represents primarily nonprofit public interest organizations.[11] It is difficult to imagine more explicit refutation of the proposition that rates charged by private attorneys presumptively coincide with the "reasonable hourly rate" for their services.

B

In sum, the clear intent of Congress and controlling precedent in the Supreme Court and this circuit leave little room for a free-ranging policy analysis of the "best" method for determining reasonable hourly rates under the attorney fees acts. Even if the issue were an open one—and, most emphatically, it is not—I am not persuaded by the policy arguments advanced by the majority to support tying the reasonable hourly rate to the firm's own billing rate.

The majority's reasoning reduces to the view that setting hourly rates according to the established rate is

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not suggest that the market rate is presumptively congruent with the attorney's billing practice. Maj. op. at 25 n.86.

Nor can the majority's holding coexist with the *en banc* decision in *Copeland v. Marshall.* As in the recent decision in *Murray v. Weinberger,* —— F.2d —— (D.C. Cir. No. 83-1680, decided Aug. 24, 1984), the fee in *Copeland* did correspond with the fee generally charged by the firm. But as *Copeland* makes explicit, 641 F.2d at 902, the District Court must look at evidence of fees charged by other lawyers engaged in comparable litigation in addition to the firm's historical rates. The court in *Copeland* did not undertake a mechanical "bracketing" of the firm's rate. It merely used that rate as one factor among many in determining the hourly rate prevailing in the community. Indeed the entire thrust of the analysis is that the rates charged by attorneys are not presumptively dispositive.

[11] *See also Donnell v. United States,* 682 F.2d 240, 251-252 (D.C. Cir. 1982) (Wilkey, J., writing for a unanimous court) ("some attorneys may receive fees based on rates higher than they normally command if those higher rates are the norm for the jurisdiction in which the suit was litigated"), *cert. denied,* 459 U.S. 1204 (1983).

easier and less arbitrary to administer. The court effectively discards the methodology applied in this circuit without exception since *Copeland* because it considers that approach to be a "charade," an "arbitrary divination," and a "complex and expensive overlay of delusive mathematical form." Maj. op. at 30-31. We are told that a series of benefits will flow from the adoption of a more "predictable" approach, including the avoidance of a second major litigation over attorney fees and a generally more accurate measure of the market value of the legal services rendered.

In my judgment, the promise of greater predictability and ease of administration is largely illusory.[12] At first glance, using a private firm's historical billing rate as a touchstone for determining market value seems elegantly simple. On closer inspection, however, the proposed approach proves no less difficult and no more precise than the established inquiry of ascertaining rates "prevailing in the commnuity for similar services by lawyers of comparable skills, experience and reputation." *Blum, supra*, 104 S.Ct. at 1547 n.11. Many private firms have no uniform billing rate clearly etched in stone. *Concerned Veterans, supra*, 675 F.2d at 1325. Moreover, as a practical matter there is often substantial play in the joints of even the most established billing practice. The rate may

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[12] The majority suggests that rather than "'nickle and diming' the guidelines" it offers, I should "flesh out" the approach I endorse. Maj. op. at 32. To do so would be entirely superfluous. The approach I defend is that which was announced by the court *en banc* in *Copeland* and, since that decision, has been successfully applied in dozens of cases, including this one. It is the majority that effectively abandons the settled law of this circuit, and the burden is thus on it to advance a policy argument so weighty that it justifies creating an internal conflict in the law of this circuit. In my judgment, that burden has not been carried. Rather than feeling "incompetent," maj. op. at 39, to engage in a free-ranging policy analysis, I simply do not feel I have license to do so in this case.

well depend on the nature of the service rendered, the relationship with the client, its ability to pay, or myriad other considerations. In many instances the rate charged by a firm may have changed substantially during the course of the litigation that is the basis of the fee request. The changes may reflect the rising or sinking fortunes of the firm or the effects of inflation. *See, e.g., Concerned Veterans, supra,* 675 F.2d at 1325 ("inflation perforce induces rapid changes in billing practices"); E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 191 (1981). Indeed, in this very case litigation on the merits wended its way through the courts for over 14 years, largely coinciding with a period of rampant inflation. In short, the seemingly simple variable of the private firm's historical billing rate often will prove to be a rapidly shifting, multi-determined complex of figures. It cannot be said with certainty that focusing on historical billing rates will generate fewer discovery requests, less litigation, and greater prospects for negotiated settlement than the methodology the majority today supplants. Indeed, in *Copeland,* 641 F.2d at 896, the court rejected a "cost-plus" approach to setting attorney fees precisely because it would necessitate considerable litigation over the inner workings of a law firm.

Thus I remain unconvinced that the approach endorsed by the majority is more administrable or will prevent the fee application from developing into a "second major litigation." Maj. op. at 33-34, *quoting Hensley v. Eckerhart, supra,* 103 S.Ct. at 1941. Indeed, there is a certain irony in the court's reasoning, for a virtually inevitable consequence of the majority's effort to make new law in this case is to give disappointed fee litigants the clear message that even if they don't prevail in District Court under the controlling legal standard, they should continue to press their claims vigorously at the appellate level.[13]

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[13] The Supreme Court has made clear that it disfavors any approach to fee calculations that encourages litigants to pursue ap-

In my view, the better approach is also the required approach. Consistent with the standard set out in *Copeland* and the method of proof enunciated in *Concerned Veterans*, the fee applicant must provide specific evidence of the prevailing rate for comparably complex federal litigation. Relevant documentation may include "affidavits reciting the precise fees that attorneys with similar qualifications have received," and "[r]ecent fees awarded by the courts or through settlements to attorneys of comparable reputation." *Concerned Veterans, supra*, 675 F.2d at 1325.[14] No doubt, rates charged in the firm's prior representations "*may* afford relevant comparisons." *Blum, supra*, 104 S.Ct. at 1574 n.11 (emphasis added). Nor do I question that in some, but by no means all, instances the applicant's customary billing practice will provide the "best evidence" of the market rate. *Concerned Veterans, supra*, 675 F.2d at 1325. But neither the policy underlying the attorney fees acts nor the precedent construing them support the suggestion that a private firm's billing rate is presumptively dispositive and

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pellate review of the District Court's award. *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1941 (1983).

> In systemic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases, including the substantive civil rights claims that § 1988 was meant to facilitate. Regular appellate scrutiny of issues like those in this case also generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after. Ultimately § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion * * * in its wake. * * *

Id. at 1951 (Brennan, J., concurring in part and dissenting in part).

[14] The court may consider the fee charged by the losing party's counsel. *See Swann v. Charlotte-Mecklenburg Board of Education, supra* note 3, cited in *Senate Report* and discussed in note 3 *supra*.

that any incongruence between that rate and the fee award is a reversible error of law. Because, in my judgment, the District Court meticulously applied the correct standard, I would affirm its determination of reasonable hourly rates.

II

I would also affirm the District Court's decision to adjust the lodestar to account for the risk of not prevailing. Were it my task to canvass the evidence *de novo* and fix an appropriate contingency multiplier, conceivably I would disagree with the determination below. But such is not my task, nor should it be. We may reverse an adjustment in the lodestar only if it constitutes an abuse of discretion. *Copeland, supra*, 641 F.2d at 893. This deferential standard is "appropriate" not only "in view of the district court's superior understanding of the litigation," but as well because of "the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley, supra*, 103 S.Ct. at 1941. Review under a more exacting standard encourages protracted appellate litigation, increases the uncertainty and expense of bringing a civil rights suit, and, in so doing, may well discourage other victims of civil rights violations from pressing their claims. *Id.* at 1951 (Brennan, J., concurring in part and dissenting in part). Purporting to apply the appropriately deferential standard, the majority finds a contingency adjustment inappropriate in this case. Because, however, the District Court indisputably applied the correct legal standard, carefully evaluated the substantial submissions on the issue, and fully articulated the basis for its determination, quite frankly I am at a loss to understand how the majority can conclude that the court below abused its discretion.

The majority's analysis is succinct. It reads *Blum, supra*, to suggest that contingency adjustments are proper only in "exceptional" cases and then finds the odds of success at the outset of this 14-year-old litigation not

"unusual" enough to meet this standard. Maj. op. at 50. Distilling from *Blum* an "exceptional cases" test is no mean feat. *Blum*, as the majority recognizes elsewhere, explicitly declined to analyze the appropriateness of an upward fee adjustment to account for the risk of not prevailing. 104 S.Ct. at 1550 n.17.[15] The Court did suggest that adjustments to reflect the *quality of representation* would be "exceptional" because that factor ordinarily would be subsumed by the reasonable hourly rate variable. *Id.* at 1549. But this reasoning does not apply to the quite different question of the contingency multiplier. Indeed, consistent with *Blum*'s concern to avoid "double counting," in *Concerned Veterans, supra*, 675 F.2d at 1328, we admonished the District Court *not* to include the risk premium in calculating the lodestar figure. The "exceptional cases" test fashioned by the majority thus finds no support in the prior decisions of the Supreme Court.[16]

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[15] The Court observed that the fee applicants had not asserted and had made no effort to document a claim that the riskiness of the suit warranted an upward adjustment in the fee. Accordingly, it found that the District Court had erred in relying on the prospects for success in the litigation in making its calculation. *Blum v. Stenson, supra* note 4, 104 S.Ct. at 1550.

[16] While this case was pending another panel of this court did suggest that the contingency multiplied should be available only in "exceptional circumstances within the meaning of *Blum v. Stenson*." *Murray v. Weinberger, supra* note 10, —— F.2d at ——, slip op. at 14 (opinion by Wilkey, J.). *Murray*'s reliance on *Blum* mirrors that of the majority and, in my view, is equally incorrect. In any event, the holding of *Murray* is irrelevant to this case. Determining whether a case is "exceptional within the meaning of *Blum v. Stenson*" is, of course, difficult when the *Blum* court expressly eschewed discussion of the contingency factor. The only actual use of the word "exceptional" in the opinion refers to the extent of the plaintiff's success and provides no guidance at all in measuring the appropriatenes of a contingency adjustment. *Blum v. Stenson, supra* note 4, 104 S.Ct. at 1548-1549. "[E]xceptional within the meaning of *Blum*" can only refer to the Court's repeated admonition that in weighing adjustments to the lodestar the District Court

After careful consideration the District Court found that the odds of success at the outset of the litigation were approximately even. 572 F.Supp. at 379. Provided only that the lodestar figure does not already subsume the risk of non-success, whether these odds may be deemed "exceptional" is irrelevant in calculating the contingency adjustment.[17] Congress made a deliberate judgment[18] to encourage litigants to press claims for viola-

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not engage in "double counting" by compensating the attorney for factors already included in the lodestar figure. Three times the *Blum* Court returned to the theme: "only in the rare case" will the "quality of service rendered" not already be built into the reasonable hourly rate; "the novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel * * * [and the] reasonable hourly rate"; " 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee." *Id.* Although this interpretation effectively collapses the first and third factors listed in *Murray*, it is the only coherent way to extrapolate from *Blum*'s discussion of other lodestar adjustments an "exceptional circumstances" test applicable to the contingency factor.

In this case the District Court scrupulously and explicitly followed our suggestion in *Nat'l Ass'n of Concerned Veterans v. Secretary of Defense*, *supra* note 10, 675 F.2d at 1328, that the risk of non-success *not* be incorporated in the lodestar figure. *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354, 379 n.50 (D. D.C. 1983). The majority does not suggest otherwise. Therefore, the concern of the *Blum* Court and, derivatively, the *Murray* court embodied in the "exceptional circumstances" test has no bearing on this case.

[17] The majority reasons that a 50% chance of success is the "norm for litigated cases—in the average case, one side will win, one will lose." Maj. op. at 51 (emphasis deleted). This is analogous to suggesting that on any given day the chances of rain are even—either it will rain or it won't.

[18] At least two of the cases cited in *Senate Report* as applying the appropriate standard adjusted the award to account for the risks incurred by the attorney. *See Stanford Daily v. Zurcher*, 64 F.R.D. 680, 682 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974). *See generally* E. LARSON, *supra* note 2, at 215 (proper use of the contingency factor fulfills the congressional design).

tion of civil rights even where the chances of success are uncertain. The legislative decision to permit courts to make adjustments to compensate for the risk of not prevailing reflects the "experience of the marketplace that lawyers generally will not provide legal representation unless they receive a premium for taking that risk." Berger, *Court Awarded Attorney's Fees: What Is Reasonable?*, 126 U. PA. L. REV. 281, 325 (1977). No doubt, Congress did not intend to encourage suits even where the prospects of success are extremely remote.[19] But where, as here, the probabilities approached 50 percent, adjusting the lodestar to account for the prospect of large, uncompensated outlays of time and money is entirely consistent with—indeed, mandated by—the congressional design. *Blum*, *supra*, 104 S.Ct. at 1550-1551 (Brennan, J., concurring); E. LARSON, *supra*, at 215.

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[19] The majority draws a distinction between a "contingency multiplier" and a "contingency enhancement." I agree that the District Court's task goes beyond merely ascertaining the numerical probability of success at the outset of the litigation and multiplying the lodestar by the reciprocal of that figure. Congress did not make clear how much encouragement it wished to give suits of "varying degrees of promise," Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L. J. 473, 499 (1981), and I am reluctant to attribute to Congress the intent to encourage suits irrespective of the remoteness of the chance of success. *Id.* at 481. But the fact remains that Congress believed that effectuation of the civil rights laws required encouraging suits even where the prospects of success were uncertain. *See* note 15 *supra*. Thus it falls to the District Court to determine whether, measured from the outset of the litigation, the probabilities of success were of sufficient magnitude that providing the attorney with some incentive to take the case is consistent with the congressional design. Once having made his determination, the District Court must exercise its judgment as to how much monetary incentive the rational attorney would require to compensate for the risk of large, uncompensated outlays of time and money.

CONCLUSION

In *Copeland* this court, sitting *en banc*, recognized that the process of setting the lodestar figure and calculating adjustments is "inherently imprecise and that certain estimations must be made." 641 F.2d at 893. But for the policy reasons discussed above we concluded that the District Court was in the best position to determine the appropriate figure and that we would not second guess that judgment absent an abuse of discretion. In my view, the majority has done just that. Substituting its judgment for that of the District Court, the court today disregards this circuit's carefully crafted approach to civil rights attorney fees awards and, in so doing, frustrates the intent of Congress and injects unnecessary confusion into an area of law I had thought settled long ago.

Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption Omitted]

Before: WRIGHT, TAMM and WILKEY, *Circuit Judges*

ORDER

(Filed November 21, 1984)

On consideration of Appellees' Petition for Rehearing . . . it is

* * * *

ORDERED, by the Court, that the Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption Omitted]

Before: ROBINSON, Chief Judge; WRIGHT, TAMM, WALD, WILKEY, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges

ORDER

(Filed November 21, 1984)

Appellees' Suggestion for Rehearing *en banc* and the briefs *amicus curiae* in support thereof have been circulated to the full Court and a majority of the judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED, by the Court, *en banc*, that the Suggestion for Rehearing *en banc* is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Chief Judge Robinson and Circuit Judges Wright and Ginsburg would grant the Suggestion for Rehearing *en banc*.

Circuit Judges Wald and Edwards did not participate in this order.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action 2111-70

MARY PAT LAFFEY, *et al.*,
Plaintiffs

v.

NORTHWEST AIRLINES, INC.,
Defendant

MEMORANDUM OPINION

(Filed July 29, 1983)

I. Introduction

This case is before the Court on Plaintiffs' application for an award of over $5 million in reasonable attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k). The application is the most recent—although certainly not the final—stage of this protracted Title VII and Equal Pay Act litigation. The action has been an extraordinary undertaking in many respects, consuming thirteen years and thousands of personnel hours and raising numerous issues under both statutes. It was virtually inevitable that the action would culminate in an equally extraordinary fee petition.

The torturous history of this litigation need not be recounted in detail. It is sufficient to note that the saga began on July 15, 1970 with the filing of a complaint on behalf of a class of Defendant's female flight attendants; ten counts were brought under Title VII and four counts under the Equal Pay Act. In the ensuing thirteen years,

the parties and their counsel committed their time, energies, and considerable legal skill to an extended period of pretrial discovery, a full trial on the merits, two rounds of appeals, and one *certiorari* petition. And the end is not yet in sight. The parties have appealed this Court's judgment of November 30, 1982 [1] and this Court fully expects the disposition of Plaintiffs' fee application to follow the same course. This opinion clearly is not the final word in this litigation.

The fee application process began in earnest in June 1982. At that time, all other remand issues having been resolved or submitted to the Court for resolution, the Court entered an Order directing counsel to commence negotiations on the attorneys' fees and to report to the Court on the status of those discussions.[2] Bredhoff & Kaiser, the law firm that represented Plaintiffs throughout the entire litigation, had retained Daniel Rezneck of Arnold & Porter to negotiate and, if necessary, litigate the attorneys' fee award. Michael Gottesman, Plaintiffs' principal counsel and one of the senior partners at Bredhoff & Kaiser, explained that the firm believed the fee award could most effectively be pursued by a "dispassionate . . . highly experienced litigator who was not so intimately involved in the *Laffey* case."

In November 1982, the parties advised the Court that their negotiation efforts had produced no accord and pre-

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[1] The Court's November 30, 1982 Order entered final judgment for Plaintiffs, incorporated the injunctive orders entered throughout the course of the litigation, and established the amounts of backpay due each of the 3,364 cabin attendants who was entitled to recover backpay—a total of approximately $52 million.

[2] Defendant had expressed interest in beginning the fee negotiations in early 1978, after *certiorari* was denied, but the suggestion was rejected by the Court. In April 1978, after the mandate had issued from the Court of Appeals, this Court entered an order staying the provision of its 1974 order that directed the parties to proceed with the fee discussions.

sented the Court with a proposed schedule for the orderly litigation of the attorneys' fee. The parties' timetable—approved by the Court on December 1, 1982—called for several months of discovery prior to submission of the formal fee petition. The discovery was undertaken and, following the Court's resolution of the disputes that arose during that process, Plaintiffs filed their Application for an Award of Attorneys' Fees and Expenses (hereinafter "Plaintiffs' Application") on March 22, 1983. This document was followed by (1) the Submission of Northwest Airlines, Inc., with Respect to Plaintiffs' Application for an Award of Attorneys' Fees and Expenses ("NWA Submission"); (2) Plaintiffs' Reply Brief in Support of the Application; (3) Defendant's Response to Plaintiffs' Reply Brief; (4) Plaintiffs' Supplemental Application for an Award of Attorneys' Fees and Expenses ("Supplemental Application"); (5) Defendant's Response to the Supplemental Application; and (6) Plaintiffs' Reply Brief in Support of the Supplemental Application; (7) Plaintiffs' Update to the Supplemental Application; and (8) Defendant's Response to Plaintiffs' Update. These submissions were accompanied by multiple volumes of appendices, exhibits, affidavits, charts, summaries, and the like. The result is a fee application covering all hours worked and expenses incurred from July 15, 1970 to July 15, 1983 and encompassing well over a thousand pages of material. It is the most extensive fee petition this Court has ever received.[3]

The following chart summarizes the amounts claimed by Plaintiffs for their counsels' fees and expenses and the amounts Defendant suggests are properly sought.[4]

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[3] It is also one of the most hotly contested. Defendant rails against Plaintiffs' "extravagant and outlandish" submission and likens its reading of the application to a trip to the "Land of Oz."

[4] These figures do not include 141.625 hours of Bredhoff & Kaiser attorney time and 77.75 hours of Arnold & Porter attorney time

It is evident from this tabulation that the parties' view of the fee request is markedly dissimilar.

BREDHOFF & KAISER		AMOUNTS REQUESTED	NWA'S PROPOSAL
Merits Issued			
Fees:	Lodestar	$1,494,450.80	$ 903,875.15
	200% Adjustment	2,988,901.60	*
Expenses:	Paralegals/Clerks	76,290.15	76,065.00
	Disbursements	$ 101,183.84	$ 29,390.04
	Sub-Total:	$4,660,826.39	$1,009,330.19
Attorney Fee Issues			
Fees:	Lodestar	$ 193,481.27	$ 39,240.63
Expenses:	Paralegals/Clerks	27,529.50	9,244.50
	Disbursements	$ 4,960.32	608.81
	Sub-Total:	$ 225,971.09	$ 49,093.94
ARNOLD & PORTER			
Attorney Fee Issues			
Fees:	Lodestar	$ 164,893.75	$ 25,070.76
Expenses:	Paralegals/Clerks	25,770.00	10,061.25
	Disbursements	$ 20,916.33	$ 2,589.63
	Sub-Total:	$ 211,580.08	$ 37,721.64
	TOTAL:	$5,098,377.56	$1,096,145.77

* Defendant does not specify the multiplier that would be appropriate, but suggests that it be limited to a "very modest" contingency increase.

The Court's assessment of these competing claims follows, as it must, the market value methodology adopted by the Court of Appeals in this Circuit: the number of hours reasonably devoted to the litigation is multiplied by the attorneys' reasonable hourly rates to arrive at the "lodestar" calculation. This sum then may be adjusted upward or downward to reflect the characteristics of the

that were eliminated from the fee request in an exercise of "billing judgment."

particular case (and counsel) for which the award is sought. *See Copeland v. Marshall* ("*Copeland*") 641 F.2d 880 (D.C. Cir. 1980) (en banc); *National Association of Concerned Veterans v. Secretary of Defense* ("*Concerned Veterans*"), 675 F.2d 1319 (D.C. Cir. 1982). Because many of the calculations mandated by this methodology are inherently imprecise and require certain estimates or approximations, the Court must exercise its discretion—soundly informed by its knowledge of the litigation before it and the experience it has acquired in numerous other cases—to arrive at the final fee award.

This Court has reviewed the *Laffey* fee application in all its exhaustive detail and concludes that the following award of attorneys' fees and costs constitutes a fair, reasonable and fully compensatory award.

II. Number of Hours Reasonably Expended

The first component of any court-awarded attorneys' fee is the number of hours reasonably expended on the litigation. *Concerned Veterans*, 675 F.2d at 1323; *Copeland*, 641 F.2d at 891. Although a fee applicant is entitled to full compensation for his counsels' efforts, "[i]t does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended." *Copeland*, 641 F.2d at 891. "Billing judgment" is an important element of fee setting, whether the fee is set in the private sector by an attorney, or is awarded by a court pursuant to a fee-shifting statute; in each instance, excessive or unproductive hours are excluded from the fee calculations. *Id. See also Hensley v. Eckerhart*, —— U.S. ——, 51 U.S.L.W. 4552, 4554-4555 (May 16, 1983).

The fee applicant bears a "heavy obligation" to document the number of hours devoted to the litigation. *Concerned Veterans*, 675 F.2d at 1323-1324. Although it is not necessary to know "the exact number of minutes spent nor the precise activity to which each hour was

devoted," the fee application must contain sufficient detail to permit both the court and opposing counsel to conduct an informed appraisal of the merits of the application. *Id.* at 1327. Where the fee applicant has omitted non-productive time from the fee request, the application should identify "the nature of the work and the number of hours involved." *Id.* at 1327-1328.

Plaintiffs have requested compensation for 13,932.25 hours of attorney time.[5] In support of that request, Plaintiffs have proffered extensive supporting documentation, including a day-by-day breakdown of the time spent during the past 13 years by each attorney on the case and a description of the hours that were excluded from the application in the exercise of "billing judgment."

Defendant does not contest the reasonableness of most of the hours Plaintiffs' counsel invested in this litigation —and with good reason. This Court's independent examination of the hours devoted to this action indicates that they are documented in accordance with the criteria set forth in *Concerned Veterans*[6] and, in most instances were

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[5] The Court treats separately the hours devoted to the litigation by attorneys and those logged by paralegals and law clerks. Although all reasonable hours spent by paralegals and law clerks are compensated on the basis of an hourly rate—the same methodology employed for compensating attorneys—the parties have included these hours as part of the costs and expenses, rather than as part of the lodestar.

[6] The Court finds little evidence of the "severe deficiencies" in counsels' record-keeping and work descriptions to which Defendant alludes. NWA Submission at 45. A fee application need not recite "the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." Copeland, 641 F.2d at 891 (quoting Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973)). It is sufficient if the application contains "detailed summaries based on contemporaneous time records indicating the work performed by each attorney for whom fees are sought." Concerned Veterans, 675 F.2d at 1327 (footnote omitted). Plaintiffs' application does so. The summaries of counsels' hours

reasonably expended. There are, however, four categories of hours that Defendant challenges as unreasonable; the Court deals with each category of contested hours separately below.[7]

A. The "Lost Issues"

Because Title VII authorizes an award of fees only to a "prevailing" party, 42 U.S.C. § 2000e-5(k), Defendant objects to an award of fees for the hours Plaintiffs' counsel spent preparing and litigating motions that were decided in Defendant's favor. Defendant originally identified six "lost issues" for which it contends compensation should be denied, but withdrew its challenge as to two issues following the Supreme Court's intervening decision in *Hensley v. Eckerhart*, —— U.S. ——, 51 U.S.L.W. 4552 (May 16, 1983). Four issues and 254.25 attorney hours remain in dispute.[8]

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contain sufficient detail to permit this Court "to make an independent determination whether or not the hours claimed are justified." *Id.* No more is necessary.

[7] *See* Donnell v. United States, 682 F.2d 240, 250 (D.C. Cir. 1982) (where the opponent of a fee application raises specific and substantial questions about the number of hours worked, the court must state specifically why the claims lack merit).

[8] Defendant continues to object to any award of compensation for time spent on (1) Plaintiffs' motion to have Defendant adjudged in contempt of this Court's 1974 remedial order for failing to equalize pay scales for male and female cabin attendants (80.75 attorney hours); (2) Plaintiffs' request to revise the rate of post-judgment interest in light of a new District of Columbia statute (98.75 attorney hours); (3) Plaintiffs' motion to determine the relevant filing date of the EEOC charge (15.5 attorney hours); and (4) Plaintiffs' two motions for reconsideration of this Court's ruling on the "pre-Act longevity" issue. (59.25 hours). (The Court's ruling was issued in response to Defendant's Request for Instructions and/or Clarification.) Defendant concedes that Plaintiffs are entitled to compensation for 8 hours they spent originally litigating the matter, but vigorously objects to footing the bill for Plaintiffs' efforts to persuade the Court to alter its ruling.

This Court concurs in Defendant's assessment that *Hensley* is relevant to this dispute, but concludes that virtually all of the hours devoted to the so-called "lost issues" are fully compensable.

It is true, of course, that "no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail." *Copeland*, 641 F.2d at 891-892 (footnote omitted). The Court of Appeals has adopted a practical approach to this inquiry, however, *Concerned Veterans*, 675 F.2d at 1327 n.13, and has admonished trial courts to apply the rule with care:

> [I]t sometimes will be the case that a lawsuit will seek recovery under a variety of legal theories complaining of essentially the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a plaintiff did not prevail under one or more of these legal theories. No reduction in fee is appropriate where the "issue was all part and parcel of one matter," but only when the claims asserted "are truly fractionable."

Copeland, 641 F.2d at 892 n.18 (citations omitted).

Hensley v. Eckerhart echoes and elaborates upon this theme.[9] In an opinion fortuitously issued in the midst of this fee litigation, the Supreme Court addressed (1) the standards that govern reduction of a fee award to account for issues on which the fee applicant did not prevail and (2) the relationship of the outcome of a case to an award of attorneys' fees. The Court concluded that when a fee applicant has succeeded on only some of its claims for relief, the scope of the fee award turns upon two questions:

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[9] Although Hensley involved a fee award under 42 U.S.C. § 1988, the Court noted that the standards it enunciated "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 51 U.S.L.W. at 4554 n.7.

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

51 U.S.L.W. at 4555. If the claims for relief are unrelated, *i.e.*, based on different facts and legal theories, "counsels' work on one claim will be unrelated to his work on another claim" and no fee is awarded for time spent in pursuit of the unsuccessful claim. *Id.*

The Court acknowledged, however, that many cases contain only a single claim or present multiple claims for relief that involve a "common core of facts" or related legal theories. In such cases,

> [m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot by viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Id. (citation omitted).

With the *Hensley* standards in mind, this Court has no difficulty concluding that the matters Defendant identifies as "lost issues" are not "distinct in all respects from [Plaintiffs'] successful claims." 51 U.S.L.W. at 4556. In fact, they flow directly from Plaintiffs' successful claims, for all of Plaintiffs' "lost" motions were attempts to define or broaden the scope of remedies for Defendant's proven wrongdoing. The Court's focus shifts, therefore, to the extent of Plaintiffs' success.

It is apparent that Plaintiffs' counsel obtained "excellent results." [10] Plaintiffs prevailed on every one of fourteen claims of violation and, although not every remedy they sought was awarded, they prevailed on the vast majority of remedial issues and obtained some of the most comprehensive monetary and injunctive relief ever awarded in an employment discrimination case. By any standard of measure, the relief awarded in this case is substantial—both in absolute terms and in comparison to the scope of the litigation and the number of hours expended. *Id.*

On the facts of this case, therefore, it would be inappropriate for this Court to reduce Plaintiffs' compensable hours because they did not prevail on a handful of relatively minor remedial issues.[11] Plaintiffs undeniably

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[10] This finding is not inconsistent with the Court's refusal, in Part IV, *infra*, to increase the lodestar to account for counsels' exceptional performance and/or exceptional success. Under Hensley, a plaintiff is deemed to have achieved "excellent results" when he obtains substantial relief, as distinguished from "only partial or limited success." A quality adjustment, however, requires more than substantial relief in relation to the complaint as a whole; it requires a result that is "substantially better than could reasonably have been expected," given the hourly rates commanded and the number of hours expended. Copeland, 641 F.2d at 894; Donnell, 682 F.2d at 255, n.51.

[11] See Lamphere v. Brown University, 610 F.2d 46, 47 (1st Cir. 1979) (fees may be awarded for time spent on good faith attempts to broaden the scope of remedies, even if unsuccessful). *See also*

attained substantial relief on a series of closely related claims, and they "should not have [their] attorney[s'] fee reduced simply because the district court did not adopt each contention raised." *Hensley*, 51 U.S.L.W. at 4556.[12]

The Court notes, however, that 59.25 attorney hours devoted to the so-called "lost issues" are not compensable on other grounds, i.e., that they were not reasonably expended.

After this Court resolved the "pre-Act longevity" dispute in Defendant's favor, Plaintiffs sought reconsideration of the Court's order. They did so because their counsel "genuinely believed" that the Court's ruling misconstrued the cases on which it relied and because "they thought they could demonstrate this more clearly than they had" in their original memorandum. Gottesman Affidavit at 158. The Court denied the motion for reconsideration. Four months later, Plaintiffs filed a renewed motion for reconsideration, based upon a subsequent decision in the Tenth Circuit "that they believed supported the position that this Court had rejected in its prior rulings." *Id.* The Court denied this motion as well.

Blake v. Hoston, 513 F. Supp. 663, 665 (D.D.C. 1981). In a case such as *Laffey*, where the law is unsettled and the parameters of remedial relief are unclear, it is incumbent upon counsel to pursue every reasonable avenue of relief to which their clients might be entitled. Such efforts should not be penalized by refusing attorneys' fees for them. Although Plaintiffs' motions were denied, the Court rejects Defendant's implicit suggestion that the motions were frivolous and motivated by counsels' "knowledge that the defendant probably will be required to pay their fees." NWA's Submission at 46. The record simply does not support the assertion that Plaintiffs' counsel were "grasping at faint straws," or seeking to enhance their fee at Defendant's expense.

[12] This Court's determination that attorney hours devoted to these issues are compensable applies with equal force to all reasonable hours spent by law clerks and paralegals on the same matters. See Part V-C, *infra*.

The Court acknowledges that a great deal of money was at sake in the longevity dispute and that the issue was fully deserving of the parties' time and energies. The Court acknowledges, too, the sincerity of counsels' belief that its ruling was unwise or erroneous. Counsels' convictions, however, do not justify repeated litigation of the issue. Both parties were afforded a full opportunity to brief the question prior to this Court's ruling. Plaintiffs' decision to invest an additional 59.25 attorney hours to reargue the matter was unreasonable and will not be sanctioned through an award of fees. The following deductions are appropriate:

Gottesman	43.875 hrs. (at $175/hr.)
Weinberg	15.375 hrs. (at $150/hr.)

B. Gilbert Feldman's Hours

Among the mass of attorney hours for which Plaintiffs seek compensation are 160.5 hours logged by Gilbert Feldman immediately prior to and during the trial of this action. After noting that Feldman represented a class of flight attendants in a similar action against Trans World Airlines,[13] Defendant contends that none of his hours are compensable because (1) Feldman was not retained by Plaintiffs to represent them and (2) he observed the *Laffey* trial solely for the benefit of his own clients. The Court rejects Defendant's argument as factually inaccurate and inconsistent with the law in this Circuit.

The affidavits submitted by Michael Gottesman demonstrate that Feldman was more than a passive on-looker in this litigation; he performed a variety of legal services for Plaintiffs, including pre-trial preparation of witnesses, examination of a witness at trial, and "on-the spot" counseling on questions that arose during trial.

[13] Maguire v. TWA, 535 F. Supp. 1283 (S.D.N.Y. 1982), *aff'd mem.*, No. 82-7322 (2d Cir. 1983).

Feldman performed these services at Gottesman's request and pursuant to an oral agreement with Gottesman that he would serve as additional counsel for Plaintiffs at trial and that his time would be included in the fee claim if Plaintiffs prevailed.

The fact that Feldman was not formally retained by Plaintiffs and was not paid for his work is irrelevant; it does not obliterate the value of his services, nor does it require Plaintiffs to be compensated for his time at anything less than its full market value.[14] *See Jordan v. Department of Justice*, 691 F.2d 514, 523-524 (D.C. Cir. 1982) (legal services performed by unpaid law students are compensated at the full market value of those services). Feldman's apparent litigation experience, combined with his independent knowledge of Defendant's employment practices (acquired by virtue of his union client's former representation of Defendant's cabin attendants) made it eminently reasonable for Gottesman to solicit his participation and assistance in the case. There is no suggestion or indication that Feldman's services were superfluous, and Plaintiffs accordingly are entitled to compensation for 160.5 hours of his time.[15]

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[14] It is equally irrelevant that (1) Feldman's complaint against Trans World Airlines was patterned after the *Laffey* complaint, and (2) the experience he gained in Laffey ultimately may have redounded to the benefit of his *Maguire* clients. An attorney's knowledge is by nature cumulative; every case in which he participates expands his knowledge and thereby benefits, either directly or indirectly, future clients. It is absurd to suggest, however, that the attorney should receive no compensation—or should receive a reduced fee—to account for that "re-usable" knowledge. Attorneys do not discount their fees to reflect the experiential value of a case (although they may reduce their fee if inexperience in a particular area causes them to spend more time on a matter than is reasonable) and this Court is aware of no judicial decision suggesting that they should. This Court declines to be the first to announce such an astonishing result.

[15] The hourly rate at which Feldman's time shall be compensated is discussed at Part III, *infra*.

C. Allocation of Tasks Between Partners, Associates and Paralegals

Defendant contends that many tasks in this lawsuit "that could have been completed competently by an associate or paralegal were performed by attorneys seeking partner level compensation." NWA Submission at 56.[16] As a consequence, Defendant asserts that the allocation of tasks in the litigation was "highly inefficient" [17] and asks this Court to award fees based solely on the level of experience *necessary* to perform the services. Defendant does not challenge the *number* of hours expended;

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[16] For example, Defendant claims that Gottesman seeks an award of $175/hour for hundreds of hours devoted to "basic legal research" and "writing initial drafts of numerous briefs." NWA Submission at 56-57. Defendant concludes that those tasks *could* have been completed by an associate and therefore should be compensated at associate rates. More specifically, Defendant defines "legal research, preliminary drafting, [and] document review" as "associate work" and "filing, xeroxing, proof-reading, digesting depositions, picking up or delivering pleadings, talking with class members or reporters after entry of judgment, etc." as "paralegal or administrative work." Other tasks that Defendant identifies as properly delegable include (1) computations performed by partners (instead of associates) in connection with "settlement analysis," (2) compilation of trial exhibits (properly the work, Defendant contends, not of associates but of paralegals); and (3) travel time. With the exception of travel time, which Defendant contends should be compensated entirely as "paralegal/administrative" work, Defendant proposes compensating the "partner hours" devoted to these delegable tasks on the basis of a 60-40 ratio: 60% of the time spent on these matters is allocated to associate time, 40% allocated to partner time. Where associates have performed work that might have been performed in large part by paralegals, Defendant proposes a 50-50 allocation of the hours between associate and paralegal time.

[17] In support of its assertion, Defendant proffers the affidavit of "law firm economic consultant" Lawrence Bright. Mr. Bright opined that the substantial involvement by partners Gottesman and Weinberg in research and drafting activities was "an inefficient way to handle the case."

it suggests only that they be redistributed among the various levels of personnel and compensated at commensurately lower hourly rates.

Defendant's argument—including the opinion of its "efficiency expert"—is predicated on the erroneous assumption that there is a single, correct staffing pattern for every lawsuit, *viz.*, that plaintiffs' counsel have an obligation to perform legal work in a minimally competent way. This Court finds no support for this approach in either the case law in this Circuit, the interest of the attorneys' clients, or the goal which Defendant's methodology purports to serve: the efficient conduct of litigation. Indeed, depositions of several attorneys that were taken in connection with this fee litigation demonstrate that there are circumstances in which it is *more* efficient for partners to perform such tasks as research, drafting, and compilation of trial exhibits, than to assign the performance of these tasks to associates working under partners' supervision.[18]

This Court concludes that the allocation of responsibility between partners, associates and paralegals with respect to most tasks is a function of many variables and that there is no uniform approach that applies in all instances. "It is an inherent part of an attorney's task to determine what types of expertise should be brought to bear on a legal problem," *Connors v. Drivers, Chauffeurs & Helpers Local Union 639*, C.A. 82-1840, slip op. at 15 (D.D.C. March 4, 1983) and "[a]bsent a

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[18] *See* Deposition of William A. Carey, Defendant Exhibit 25 at 55-56, and Deposition of James A. Dobkin, Defendant Exhibit 26 at 30-31. Both attorneys indicated that, depending upon the nature of a particular case and the legal issues involved, a partner's greater legal expertise and/or familiarity with the facts might warrant more involvement by the partner in tasks that otherwise could be delegated to associates. *See also* Gottesman Affidavit at 15-19.

clear misallocation of resources, this Court is unwilling to second-guess counsel's judgment." *Id.*[19]

This does not mean, however, that the Court will not exercise any oversight of counsels' staffing decisions. Although "plaintiffs are not required to assign, to any given task, the minimum amount of legal skill capable of accomplishing it. . . . time spent by attorneys on *non-legal work—e.g.* filing information, compu.ing statistics, etc.—is not properly compensable at attorney's rates." *Ruiz v. Estelle*, 553 F. Supp. 567, 588 (S.D. Tex. 1982) (emphasis added). The Court has reviewed the time summaries for each of the attorneys and concludes that a total of 35.55 hours were devoted to non-legal tasks.[20] These hours shall be compensated, as Defendant suggests,

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[19] The Court perceives no misallocation as to most of the hours for which compensation is sought. The Court acknowledges the substantial participation by partners in virtually every phase of this litigation. (According to Defendant's calculations, partner time accounted for 64% of the attorney hours invested in the case.) In light of the complexity of the case, the novelty of the issues raised, and the caliber and tenacity of the defense, however, the Court does not find this allocation of tasks either surprising or inappropriate. Moreover, as noted in Part IV, *infra*, counsels' extensive reliance upon the skill and experience of highly-compensated partners is one factor in this Court's refusal to adjust the lodestar to account for counsels' "exceptional" performance.

[20] The following hours (and the hourly rates that apply to them) shall be deleted from Plaintiffs' compensable total:

Gottesman:	6.125	hrs. (at $150)
	12.675	hrs. (at $175)
Cohen:	1.0	hrs. (at $175)
Weinberg:	2.0	hrs. (at $160)
	4.25	hrs. (at $150)
Petramalo:	.25	hrs. (at $100)
	5.0	hrs. (at $125)
D. Clark:	1.0	hrs. (at $ 75)
	1.25	hrs. (at $100)
Collins:	2.0	hrs. (at $100)

at the paralegal hourly rate of $30. All other hours, including those spent by attorneys in transit in connection with legal matters, shall be compensated at the attorneys' hourly rates established *infra*.

D. Attorney Fee Litigation

Plaintiffs have requested compensation for 2,579 hours their counsel invested in the negotiation and litigation of the attorneys' fee award. They assert that this enormous expenditure of time was necessitated by (1) the complexity of the fee application; (2) the *Concerned Veterans* requirement for extensive, detailed documentation; and (3) "the stubborness with which NWA has fought the fee issue, its heavy discovery demands on plaintiffs, its resistance to any discovery by plaintiffs on the fee issue, and the length and breadth of its own submission in response to the fee application." Plaintiffs' Reply Brief at 59.

Defendant does not challenge the principle that time reasonably expended by both Bredhoff & Kaiser and Arnold & Porter pursuing the fee request is compensable,[21] but vigorously opposes an investment of over 2,500 attorney hours as extravagant, excessive and—especially where the entitlement to a fee is not in dispute—utterly unreasonable.[22] In addition, Defendant identifies three

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[21] It is well settled that hours reasonably devoted to negotiating and/or litigating a statutory fee award are compensable. *See* Copeland, 641 F.2d at 896 and n.29, 901; Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42, 62 (D.C. Cir. 1982). Moreover, where outside counsel have appeared on behalf of trial counsel on the attorneys' fee issue, the Court of Appeals has approved compensation for time reasonably expended by both firms. *See* EDF v. EPA, 672 F.2d at 63. *But see* Shadis v. Beal, No. 82-1260 (3d Cir. March 31, 1983).

[22] Defendant notes that the number of "professional hours" (i.e., attorney, law clerk, and paralegal hours) devoted to the fee issue is the equivalent of more than 30% of all professional time devoted to the merits of the litigation.

categories of counsels' endeavor that it contends are entirely non-compensable: time spent preparing and compiling affidavits in support of the fee application; time spent on conferences between Bredhoff & Kaiser and Arnold & Porter attorneys in connection with the fee negotiations and litigation; and time spent on discovery directed to the fee issue.[23] The Court addresses each of Defendant's contentions separately below.

1. The Affidavits

The record Plaintiffs amassed to document their fee request includes thirty-six affidavits. Two of the documents were prepared by Michael Gottesman, Plaintiffs' principal counsel on the merits, and another three by Daniel Rezneck, principal counsel on the fee petition; most of the remaining affidavits were culled from an impressive array of legal personages.[24] Plaintiffs assert that this barrage of affidavits is necessary in order to carry their "heavy burden" to document each element of the fee claim. Defendant asserts that the entire compendium of affidavits is superfluous, since this Court can glean enough information from its knowledge of the case and first-hand observation of counsel and from attorney affidavits placed in the public record in other fee applications to assess the reasonableness of the fee.[25] Defendant urges that

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[23] Defendant concludes that only 930.125 attorney hours are compensable.

[24] The affidavits attest, *inter alia*, to the actual rates charged by lawyers at some of the most prestigious law firms in Washington, D.C.; the general complexity of employment discrimination cases; the complexity and significance of *Laffey*; and the experience, expertise and sterling reputation of Plaintiffs' counsel.

[25] For example, Defendant contends that "[t]his Court . . . has had ample exposure to Mr. Gottesman's work, and hardly needed to be treated to fourteen attestations to its quality." NWA Submission at 91. Defendant also points out that "[t]his Court knows the degree of complexity of this litigation at first hand. Nothing is gained by soliciting strangers to the case to inject their opinions about its complexity." *Id.* at 90.

approximately 130 hours devoted to the affidavits be excluded from Plaintiffs' compensable hours.

Michael Gottesman spent 191.25 hours preparing a detailed affidavit reciting, *inter alia*, the history of the litigation, the legal and factual problems posed by the case, and his assessment of the risks associated with the action.[26] Defendant objects to underwriting "counsel's memoirs" on the ground that "[t]he Court, which has presided over this litigation from its commencement, surely needed no discursive recapitulation of the proceedings." NWA Submission at 97. To the extent that the affidavit contains arguments that were incorporated into the fee application, Defendant contends that the affidavit was "completely unnecessary and unwarranted."

This Court cannot accept Defendant's contention that Gottesman's affidavit was no more than a self-serving, auto-biographical exercise. The Court of Appeals implicitly has acknowledged the usefulness of affidavits from counsel. *See Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42, 54 (D.C. Cir. 1982). Indeed, given plaintiffs' "heavy obligation to present well-documented claims," *Concerned Veterans*, 675 F.2d at 1323-24, and, in particular, to set forth the specific aspects of the case that justify the lodestar adjustments they seek, *id.* at 1328-29, such affidavits may well be an indispensable component of many fee applications.

It is true, of course, that this Court has developed considerable familiarity with this case during the past thirteen years and that this knowledge is useful in assessing the fee request. *See Copeland*, 641 F.2d at 893, n.24 and 901. *See also Hensley v. Eckerhart*, 51 U.S.L.W. at 4556. However, the Court's experience and memory do not substitute for a carefully prepared, fully documented

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[26] It appears that Defendant objects only to Gottesman's first affidavit. See NWA Response to Supplemental Application at 7.

fee request. It can be presumed that, in nearly every action, the judge presiding over the fee application shepherded the case through its earlier stages and is acquainted with counsel and the course of the litigation. If the Court of Appeals had intended the Court's first-handed observation to substitute for a well-documented fee application, it would not have stressed repeatedly the necessity for Plaintiffs to produce specific evidence in support of the various elements of the fee award.

The Court acknowledges that Gottesman's affidavit is lengthy but finds no fault in this. The following passage from *Copeland* is particularly apt:

> This chronicle is necessarily lengthy because the lawsuit involved numerous and complex proceedings and maneuverings. . . . [T]he very intricacy of the litigation—which was a product, in part, of the [defendant's] vigorous and long-continued resistance to the claim asserted against it—is highly relevant to the reasonableness of the fee award.

641 F.2d at 884. The Court declines to omit any of the hours devoted to Gottesman's affidavits from the compensable total.

The Court reaches a different conclusion, however, as to the other supporting affidavits appended to Plaintiffs' fee application. It is impossible to single out particular affidavits as superfluous or duplicative. *Cf. Copeland*, 641 F.2d at 903. But after reviewing Plaintiffs' copious submissions, the Court is left with the firm impression that, in their eagerness to compile a thorough application, Plaintiffs' counsel have indulged in some "litigious overkill." [27] This Court does not suggest that fee appli-

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[27] *Cf.* the following colloquy between the Court and Plaintiffs' counsel at a February 18, 1983 hearing on the parties' discovery disputes:

Mr. Rezneck:

. . . One of the reasons why I think this discovery is necessary is that it will give the Court a full record and, therefore,

cants must document their requests at the most minimally acceptable level. The Court only concludes that the record before it clearly is far more extensive than is necessary or desirable,[28] even for a fee request of this magnitude.

Defendants must compensate Plaintiffs for their counsels' efforts in litigating the attorneys' fee, but they do not have to pay for unreasonable or excessive endeavor. Accordingly, 72.25 attorney hours will be subtracted from Plaintiff's proposed lodestar totals, as follows:

Bredhoff	1.25 hrs. (at $175/hr.)
Gottesman	8.5 hrs. (at $175/hr.)
Weinberg	6.0 hrs. (at $150/hr.)
Brudney	.5 hr. (at $100/hr.)
Rezneck	40.00 hrs. (at $175/hr.)
Burt	6.0 hrs. (at $150/hr.)
Lindon	10.0 hrs. (at $ 75/hr.)

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diminish the possibility of [a] remand. That is certainly one of our objectives here, to put in everything that we can.

The Court:

No, not everything that you can. That is just what I have tried to tell you. It is not everything that you can; it is everything that you need to substantiate your claim under the law as it presently exists. That is all I want. And the only discovery I am going to permit in this case on the fees question is the discovery that is needed, not the discovery that could be helpful—that is needed to discharge your burden under Concerned Veterans.

Transcript of Proceedings at 75.

[28] "It . . . is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps even dwarfing the case in chief." Copeland, 641 F.2d at 896 (quoting Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 116 (3d Cir. 1976)). *See also* Hensley v. Eckerhart, 51 U.S.L.W. at 4555: "A request for attorney's fees should not result in a second major litigation."

2. Inter-firm Meetings

Defendant challenges Plaintiffs' request for compensation for approximately 245 hours that lawyers from Bredhoff & Kaiser and Arnold & Porter spent in conference with one another. Defendant pronounces the conference time a "staggering" sum and argues that, because it was necessitated solely by Bredhoff & Kaiser's decision to retain separate counsel to prosecute their fee claim, none of the offending hours are compensable.

The Court declines to pass judgment on the propriety of Bredhoff & Kaiser's decision to retain separate fee counsel; it leaves to counsel the professional judgment as to how its fee application is most effectively prepared. Counsel is not free, however, to exercise its judgment in a fashion that unnecessarily inflates the losing party's fee liability, *e.g.* by injecting an additional layer of attorneys into the case. Thus, hours that would not have been expended by an attorney (or law firm) prosecuting its own petition for fees cannot be charged to its opponent when separate counsel is brought into the case to pursue the fee award. Such hours are not "reasonably necessary to obtaining a fee award" and are properly disallowed. *See Shadis v. Beal*, No. 82-1260, slip op. at 6 (3d Cir., March 31, 1983).

The Court, however, does not adopt Defendant's suggestion that *all* hours devoted to inter-firm meetings be eliminated from the compensable total. If Bredhoff & Kaiser had prepared the fee petition itself, its own attorneys would have committed considerable time to intra-firm conferences to plot their application strategy and to allocate tasks; such expenditures of time would be neither startling nor improper. The Court therefore has estimated the amount of time such conferences would have consumed and subtracts all hours in excess of that amount from Plaintiffs' lodestar figures, as follows:

Rezneck	60.0 hrs.
Burt	15.0 hrs.
Lindon	50.0 hrs.

3. Attorney Fee Discovery

Defendant asks the Court to deny compensation for all hours devoted to discovery in connection with the attorney fee application. The disputed time includes 307.875 hours spent on "offensive" discovery requests (i.e., discovery sought by Plaintiffs from Defendant) and 389.5 hours spent on "defensive" discovery (i.e., Plaintiffs' responses to Defendant's discovery requests and motions). Defendant contends (1) that it was an unwilling participant in the pre-application discovery; (2) that none of the information requested of it was "really necessary for preparation of the fee application," and (3) that the information Plaintiffs' counsel gathered in "defensive" discovery was equally unnecessary. The Court finds Defendant's arguments almost wholly without merit.

The discovery to which Defendant objects occurred as a result of a stipulation between the parties. *See* Stipulation and Order Regarding Scheduling, December 1, 1982. Defendant joined with Plaintiffs in presenting the Court with an agreed-upon schedule for pre-application discovery. Defendant was under no obligation to enter into the agreement, and the Court approved the proposed schedule without protest from Defendant. Thereafter, Defendant fully participated in the discovery process, requested and obtained substantial information from Plaintiffs, and incorporated the material in its opposition to the fee application. The Court is astounded that Defendant now suggests the discovery was wholly unnecessary—including its own discovery requests!—and completely uncompensable. Defendant's position is even more unfathomable in light of its suggestion (in connection with a dispute that arose during the now-discredited discovery) that Plaintiffs

had an obligation to collect that information, separate and apart from any discovery requests, to "document" their fee application.

Reply Memorandum in Support of Defendant's Motion to Compel, January 26, 1983 at 3. If the information collected and provided Defendant during the discovery process was necessary for Plaintiffs' fee application, the reasonable time spent assembling it is fully compensable.

With regard to the "offensive" discovery, the Court concludes that Plaintiffs' discovery requests—although broad—were not frivolous, but were *bona fide* efforts to advance Plaintiffs' legitimate litigation interests. The time devoted to them is also compensable.[29]

The Court acknowledges that the mutual pre-application discovery did not prove to be as helpful as it had hoped; for example, it does not appear to have eliminated (or even appreciably narrowed) the areas of controversy in the fee application. Nevertheless, the parties embarked on the discovery in good faith, with the full approval of the Court, and they are entitled to compensation for the hours they reasonably devoted to the task.

4. Reasonable Hours

Apart from the disputed hours devoted to the tasks addressed *supra*, Defendant asserts that preparation of Plaintiffs' fee application was characterized by "massive overkill," "inefficiency," and "extraordinary duplication of effort." Defendant attributes these flaws largely to Bredhoff & Kaiser's decision to retain separate counsel to pursue the attorneys' fee and contends that any hours expended by outside counsel beyond those that would have been required of counsel to prepare its own fee petition

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[29] Defendant asserts that because discovery work is properly the task of associates or paralegals, any compensable hours expended by partners should be compensated at the lower hourly rates applicable to these personnel. The Court is not persuaded. *See* Part II-C, *supra*.

cannot be shifted to Defendant. Defendant proposes reducing by one-half the hours spent drafting and editing the fee applications in order to compensate for counsels' "inefficiency." Plaintiffs acknowledge that some duplication of effort may have been caused by securing new counsel for the fee application, but note that they eliminated approximately 200 attorney hours from the fee request to account for that possibility.

Although Plaintiffs' counsel dedicated more time to preparing the fee application than this Court can countenance, it does not appear that they were as wide of the mark as Defendant suggests. This litigation encompassed thirteen years, thousands of personnel hours, and thousands of dollars of out-of-pocket expenditures. Given the extensive documentation requirements in this Circuit, it was inevitable that the application would entail a substantial commitment of time. Defendant's unyielding stance only increased the hours necessary to litigate the fee request. This Court does not fault Defendant for defending itself tenaciously but finds that, having vigorously contested the attorneys' fee issue, it is scarcely in a position to complain that Plaintiffs responded in kind. *See Copeland*, 641 F.2d at 904 and n.53.

Nevertheless, the Court has reviewed the time records that detail the attorney hours spent litigating the fee request (as well as the resulting written submissions) and concludes that the following hours were unnecessary, duplicative, or otherwise unreasonably spent:

Bredhoff	1.25	hrs.
Cohen	2.00	hrs.
Gottesman	60.00	hrs.
Weinberg	57.25	hrs.
P. Clark	2.25	hrs.
Brudney	10.00	hrs. (at $75/hr.)
Rezneck	39.125	hrs.
Burt	22.00	hrs.
Lindon	72.125	hrs.

E. Total Compensable Hours

The following table indicates the total number of hours for which compensation shall be awarded.

	Merit Hours	Attorney Fee Hours
Bredhoff	—	10.75
Feldman	160.5	—
Cohen	42.5	12.00
Gottesman	5,471.45	596.25
Weinberg	1,116.25	357.875
Petramalo	373.375	2.0
D. Clark	2,454.25	—
P. Clark	698.25	12.125
Collins	817.0	10.5
Gilson	53	2.625
Brudney	76.375	63.125
Rezneck	—	371.875
Burt	—	116.00
Lindon	—	556.125

III. The Reasonable Hourly Rate

The second step—and the "key issue"—in establishing the lodestar is to determine the reasonable hourly rate "prevailing in the community for similar work." *Copeland*, 641 F.2d at 892; *Concerned Veterans*, 675 F.2d at 1324. The hourly rate generally depends upon the attorneys' experience and reputation, the type of work involved,[30] and the level of skill necessary to conduct the case. *Concerned Veterans*, 675 F.2d at 1325. Other relevant considerations include the time limitations imposed by the case, the amount to be obtained in the litigation, and the undesirability of the case. *Copeland*, 641 F.2d at 892; *EDF v. EPA*, 672 F.2d at 58.

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[30] By "type of work" the Court refers not to any attorney's "in-court" vs. "out-of-court" time but to the substantive legal issues raised in the case. EDF v. EPA, 672 F.2d at 59.

Although the complexity of the market for legal services and the diversity of attorneys' billing techniques complicate the inquiry, a court must ascertain the prevailing hourly rate "with a fair degree of accuracy." *Concerned Veterans*, 675 F.2d at 1325. A fee applicant therefore must provide "specific evidence of the prevailing community rate for the type of work for which he seeks an award." *Id.*

Plaintiffs propose the following matrix of hourly rates for lawyers of differing levels of experience:

—$175 an hour for very experienced federal court litigators, *i.e.*, lawyers in their 20th year or more after graduation from law school;

—$150 an hour for experienced federal court litigators in their 11th through 19th years after law school graduation;

—$125 an hour for experienced federal court litigators in their 8th through 10th years after graduation from law school;

—$100 an hour for senior associates, *i.e.*, 4 to 7 years after graduation from law school; and

—$75 an hour for junior associates, *i.e.*, 1 to 3 years after law school graduation.[31]

They support their request with a barrage of data, including twenty-five attorney affidavits secured specifically

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[31] Many of the lawyers for whom compensation is sought fell into more than one of these categories over the course of this litigation. Although Plaintiffs request an award of current hourly rates for all hours devoted to the action since its inception, see Part IV-C, *infra*, they do not suggest that each lawyer be compensated for the entire period at the highest rate category he or she reached during the period. Rather, Plaintiffs request the Court to award the current rates applicable to each level of experience the individual lawyers had attained when the work for which compensation is sought was performed.

for this litigation, information gleaned from affidavits filed in other cases, and fee data reflected in previous judicial decisions.[32] Plaintiffs contend that this documentation establishes that (1) these are the prevailing rates in the community for lawyers of comparable skill, expertise and reputation in complex federal litigation [33] and (2) the prevailing community practice is to charge fee-paying clients in employment discrimination cases the same rates that apply to other complex federal litigation.

Defendant does not dispute the high quality of legal services rendered in this case; indeed, it acknowledges counsels' "prominence and ability" and concedes that Bredhoff & Kaiser is "one of the 'premier' employment discrimination firms in the country." Defendant also does not challenge Plaintiffs' proposed matrix as an accurate depiction of the prevailing market rates for lawyers of comparable skill and ability who represent defendants in complex Title VII cases. Finally, Defendant acknowledges that the rates Plaintiffs' counsel charge fee-paying clients are not a function are not a function of the intrinsic value of the firm's legal services but rather of the particular clients the firm chooses to represent and their ability to pay. Despite this seemingly broad accord, Defendant vigorously objects to the hourly rates set forth in Plaintiffs' application.

The focus of Defendant's opposition is the fact that the rates Plaintiffs seek are higher than any hourly rate at which their counsel has ever billed its regular fee-paying clients. For purposes of a court-awarded fee, Defendant contends there is a distinction—purportedly

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[32] Each of these methods of proof was approved in Concerned Veterans. 675 F.2d at 1325-27.

[33] Indeed, Plaintiffs assert that "the evidence we have developed indicates that, as reflections of the prevailing market rates in the community for complex federal litigation, the rates stated in the matrix are conservative." Plaintiffs' Application at 93.

fashioned in *Copeland*—between private lawyers with regular fee-paying clients and "public interest" lawyers who toil at modest salaries for non-profit legal defense funds or charitable organizations. According to Defendant's scheme, attorneys in the former category receive only the regular hourly rates charged to their fee paying clients; there is no need to look beyond those rates or to "construct" a market rate, since "the market has already placed a value on the firm's services" in the form of its regular hourly rates.[34] Public interest lawyers, however, have no billing practice, and the Court therefore *must* construct a hypothetical market value for their services based upon the prevailing market rate.[35] On the basis of

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[34] Defendant argues, in effect, that every private, fee-charging law firm is a unique market, whose market price (and compensable hourly rate) is determined "by the forces of the economic market in the same way that the value of other goods and services is determined." NWA Submission at 10. Thus, Defendant asserts that

> [i]t is . . . illusory to attempt to establish an abstract "market rate" for a particlular kind of legal services divorced from what a specific firm actually charges for performing these services. The rate actually charged by Bredhoff & Kaiser is a "market" rate for this purpoe, *i.e.*, a price determined by the supply and demand factors affecting the type of service involved, including the experience of the persons performing the task, the type of legal work being performed, the amount that clients are able and willing to pay for the legal work, and the costs of providing the services.

Id. at 20. However consistent this may be with the economic theory propounded by Defendant's experts, it is flatly inconsistent with the market value methodology outlined in Copeland. The Court of Appeals has held repeatedly and unambiguously that fee awards are based upon the rate that prevails *in the community* for the type of work involved; an attorney's actual earnings may shed light on the prevailing rate but they are not determinative. If this approach is "illusory," it falls to the Court of Appeals—not this Court—to dispel the illusion.

[35] Defendant evidently fails to grasp the rationale for inquiring into the market value of a public interest lawyers' time. The difficulty with public interest attorneys is not that they have no earn-

this dichotomy, Defendant asserts that Plaintiffs' counsel should be awarded no more than the regular hourly rates they charge their fee-paying clients.

The approach Defendant outlines finds no support either in logic or in the case law in this jurisdiction; in fact, adherence to Defendant's methodology would require a wholesale repudiation of the principles enunciated in *Copeland*. This Court has neither the authority nor the inclination to embark on such a path.

Although an attorney's actual billing rate is "highly relevant proof of the prevailing community rate," *Concerned Veterans*, 675 F.2d at 1326, it is clear that a court's fee setting inquiry does not begin and end with counsels' monthly billing statements. The Court of Appeals has indicated on numerous occasions that lawyers may receive court-awarded fees based upon rates that differ from those they normally command and has placed its imprimatur on awards far in excess of an attorney's salary or hourly rates. This result is not undesirable, but is a natural consequence of the Court of Appeals' decision to base attorney fee awards on the prevailing rate in the community for similar legal services:

> [F]ee allowances are basically to be measured by the market value of the services rendered, not the amount actually received by the attorney nor the amount that would have been received absent an award of fees.

Jordan v. Department of Justice, 691 F.2d at 523-524 (footnotes omitted). There is no room in this "market value" approach for the distinction Defendant attempts to create here.

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ings set by the "supply and demand factors" of the free market from which to determine their value; it is simply that their clients pay an artificially low price for their services and therefore their earnings simply do not reflect the *actual* value of their services.

The Court of Appeals noted specifically in *Copeland* that computing fees "differently depending on the identity of the successful plaintiffs' attorney"—i.e., whether counsel was a public interest firm or a private attorney —would produce results that are inconsistent with the legislative scheme of the Civil Rights Act of 1964:

> The incentive to employers not to discriminate is reduced if diminished fee awards are assessed when discrimination is established. Moreover, where a public interest law firm serves as plaintiff's counsel (*a law firm that . . . will not obtain the full value of its services* from the losing defendant) the defendant will be subject to a lesser incentive to settle a suit without litigation than would be the case if a high-priced private firm undertook plaintiff's representation.

641 F.2d at 899 (emphasis added).

This reasoning applies equally to lawyers in private firms (such as Plaintiffs' counsel) who scale their rates according to their clients' ability to pay and lawyers in non-profit public interest organizations, whose rates are similarly (albeit more drastically) reduced to reflect the financial constraints of their clientele. The issue is not whether counsel is a "true" public interest firm that represents its clients "for low fees or for no fee at all." The question is whether the attorneys' regular rates reflect the actual market value of their services. Thus, where counsels' customary fees are not "low" in an absolute sense but are nevertheless below those that prevail in the market for similar services, a court contemplating a fee award is not limited to counsels' historic fees but must frame an award that reflects the true value of the services rendered.[36]

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[36] "It is *obvious* that where counsel customarily exercises billing judgment by not billing at the market rate . . . this fact *must be* considered in calculating counsel's true billing rate." Concerned Veterans, 675 F.2d at 1326 (emphasis added).

To be sure, the evidence presented to the court to establish the prevailing rate may vary according to the nature of counsels' practice. Thus, attorneys who have a regular billing practice submit evidence of their average hourly rates, since this data constitutes "important substantiating evidence of the prevailing community rate." *Concerned Veterans*, 675 F.2d at 1326 (footnote omitted). On the other hand, attorneys who do not receive fees or who have no regular billing practice (e.g., they depend upon court-awarded fees for the bulk of their remuneration) need not submit evidence of either their hourly rates or their salaries. *Id.* at n.7a. In each instance, however, the underlying factual inquiry is the same: "The court . . . must ultimately determine, on the evidence before it, the rate prevailing in the community for similar legal work." *Jordan v. Department of Justice*, 691 F.2d at 521.

Defendant maintains, however, that compensating counsel at rates above their regular, established fees is inconsistent with the policies underlying fee-shifting statutes. It correctly observes that one of the purposes of Title VII fee awards is to provide an incentive for competent lawyers to undertake Title VII work by assuring them of adequate compensation for their efforts. *Copeland* 641 F.2d at 890. Defendant contends that awarding attorneys their regular hourly rates (adjusted to current value) is sufficient economic incentive for them to accept Title VII cases; indeed, it cautions that awarding fees in excess of counsels' customary rates would over-compensate their efforts and bestow on plaintiffs a wind-fall at defendants' expense.

This argument was raised and soundly rejected in *Copeland*. After repudiating a "cost-plus" fee-setting methodology in favor of a market value approach, the *en banc* Court acknowledged that "paying low-salaried attorneys the prevailing market rate normally will yield a larger fee than that to which they are accustomed."

641 F.2d at 899. The Court concluded, however, that this result was not inappropriate since payment of "full fees" under the market value methodology was not only consistent with Congress' intent but would provide greater incentives to the private enforcement of Title VII. Indeed, the Court observed that "comput[ing] fees differently depending on the identity of the successful plaintiff's attorney might result in . . . windfalls to defendants." *Id.* This rationale retains its vitality whether plaintiff's counsel is a public interest law firm in the traditional sense or a private fee-charging firm whose customary rates—for whatever reason—do not reflect the full value of its services. The approach mandated by *Copeland*—and the approach this Court fully intends to follow—ensures that, regardless of the nature of the law firm representing plaintiff, counsel will be compensated at rates that accurately reflect the full market value of their counsels' services.

The Court finds that the relevant legal market in this action is complex employment discrimination litigation and that this market is subject to the same hourly rates that prevail in other complex federal litigation. The Court rejects Defendant's suggestion that there are separate markets (and therefore separate prevailing rates) for the defense and prosecution of Title VII actions. The inquiry mandated by *Copeland* and its progeny focuses on the type of work performed, not on the identity of the client. The skill required to litigate a complex employment discrimination action does not vary with the attorneys' client, for each side litigates the same issues and grapples with the same underlying facts.

The Court also rejects Defendant's suggestion that, because Plaintiffs' counsel is a "union-oriented labor law firm," its rates for litigating this action should be determined by the market for legal services "in the recognized 'labor law' specialty." NWA Submission at 20-21. The Court reiterates that the appropriate benchmark for

a fee award is the prevailing rate for "the type of work for which [the fee applicant] seeks an award," 675 F.2d at 1325, not the type of work it usually performs. Defendant's comparison of counsels' actual hourly rates with the rates of other labor law firms of similar size simply misses the mark.

The Court finds further that the hourly rates proposed by Plaintiffs are within the range of rates that prevail in the Washington, D.C. area for lawyers of comparable qualifications who handle cases of this sort. The Court acknowledges that these rates are generous. However, Plaintiffs have submitted a host of affidavits attesting to the extraordinary experience and expertise of Plaintiffs' counsel in this field; these affidavits only confirm what this Court observed firsthand during the course of this lengthy litigation. Plaintiffs also submitted affidavits indicating that lawyers with comparable qualifications and expertise actually bill their clients—and receive remuneration—in cases of this sort at rates that are similar to (and, in some instances, higher than) the hourly rates Plaintiffs propose. In short, the Court concludes that the record in this action contains ample evidence that the rates Plaintiffs request are those that prevail in the community for similar work.[37] Defendant

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[37] There is only one respect in which Plaintiffs' requested hourly rates are inadequately supported. As noted in Part II, *supra*, Gilbert Feldman, although not associated with Bredhoff & Kaiser, particiapted at trial at the request of Plaintiffs' counsel. Because Feldman graduated from law school 19 years prior to the trial, Plaintiffs request an award of $150 per hour for his time. The Court has reviewed Feldman's resume, included as Exhibit 4 to Gottesman's Affidavit, and concludes that it does not reflect that level of superior achievement, expertise, skill and/or reputation that justifies the hourly rates awarded Plaintiffs' retained counsel. This Court cannot assume that these qualities are a natural function of the passage of time following law school graduation. Absent a more complete record as to Feldman's professional qualifications, the Court cannot award the same hourly rates to which Plaintiffs' retained counsel are entitled. The Court concludes that an award of $100 per hour is reasonable compensation for Feldman's services.

made no effort to produce "specific contrary evidence" that these rates are erroneous. *See Concerned Veterans*, 675 F.2d at 1326. The lodestar rates therefore are as follows:

Attorney	Hourly Rates/ Years Worked
BREDHOFF & KAISER:	
Bredhoff	$175 (1981-Present)
Feldman	$100 (1972)
Cohen	$150 (1970-May 31, 1976) $175 (June 1, 1976-Present)
Gottesman	$150 (1970-May 31, 1978) $175 (June 1, 1978-Present)
Weinberg	$100 (January 1-May 31, 1975) $125 (June 1, 1975-May 31, 1978) $150 (June 1, 1978-Present)
Petramalo	$100 (1974-May 31, 1976) $125 (June 1, 1976-May 31, 1979) $150 (June 1, 1979-Present)
D. Clark	$ 75 (1970-May 31, 1973) $100 (June 1, 1973-1975)
P. Clark	$100 (1977-May 31, 1980) $125 (June 1, 1980-Present)
Collins	$ 75 (1977-May 31, 1979) $100 (June 1, 1979-Present)
Gilson	$100 (1980-Present)
Brudney	$ 75 (1981-May 31, 1982) $100 (June 1, 1982-Present)
ARNOLD & PORTER:	
Rezneck	$175
Burt	$150
Lindon	$ 75

The Court finds no merit in Defendant's suggestion that Plaintiffs receive only 70% of the lodestar rates for time spent negotiating and litigating the attorneys' fee. There is no evidence that attorneys typically charge their clients a reduced hourly rate when they litigate an award of attorney fees on their behalf. Moreover, there is vir-

tually no support in the case law for such a result.[38] The Court of Appeals has awarded fees to counsel who represented plaintiffs on the fee issue at the same lodestar rates awarded to plaintiffs' counsel on the merits. *E.g., EDF v. EPA*, 672 F.2d at 64.[39] Any other result might create an incentive for defendants to over-litigate the attorney fee issue. *Cf. Copeland*, 641 F.2d at 899. Plaintiffs' counsel shall be compensated for their work on the attorneys' fee at the same rates awarded on the merits.

IV. Increases to the Lodestar

The second major point of contention in this fee application is Plaintiffs' request for an increase in the lodestar to account for the contingent nature of success, the delay in receipt of payment, and the allegedly exceptional quality of the representation. Plaintiffs assert that

> [t]his is an extraordinary and exceptional case in every respect—in duration, scope, complexity, difficulty, novelty, importance, vigor and intensity of litigation, risks assumed, results obtained, quality of legal services provided to the plaintiffs, and significant public policies at stake

and that it is therefore deserving of an upward adjustment of "at least" 200.[40] Defendant, on the other hand

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[38] The only case in this Circuit that Defendant cites in support of a lower lodestar rate for the attorneys' fee issue involved an unusually simple fee application. In Smith v. Schweiker, No. 76-2311 (D.D.C. May 29, 1981), *aff'd mem.*, No. 81-1860 (D.C. Cir. April 2, 1982), the Court reduced the lodestar rate for work on the fee issue where "[t]wo applications had already been filed, leaving for [the applicant] the relatively simple task of updating the petitions." Slip op. at 5.

[39] *See also*, Veterans Education Project v. Secretary of the Air Force, 515 F. Supp. 993 (D.D.C. 1981), *aff'd*, 679 F.2d 263 (1982).

[40] Plaintiffs' Application at 6. The multipliers are requested only for attorney hours spent on merits issues; Plaintiffs do not seek a lodestar adjustment for hours devoted to the fee negotiations and litigation.

variously describes Plaintiffs' proposed adjustment as "grossly excessive," "aberrationally large," and a product of "convoluted methodology" that is totally at odds with the case law in this Circuit. The Court concludes that, as is frequently the case, the proper path lies somewhere between the two extremes.

The Court begins with the familiar proposition that, although the lodestar generally compensates lawyers adequately for their time, *Copeland*, 641 F.2d at 894, it may be adjusted upward (or, in an appropriate case, downward) to reflect a number of factors peculiar to the lawsuit. The Court of Appeals has identified two broad categories of adjustments that may be made: (1) "contingency" adjustments: compensation for the risk of not prevailing and thus not recovering a fee, and compensation for the delay in payment of fees [41] and (2) "quality" adjustments: compensation for unusually good representation and compensation for securing exceptional results. *Copeland*, 641 F.2d at 892-894; *Concerned Veterans*, 675 F.2d at 1328-1329. Lodestar adjustments are not "bonuses" or "rewards" in excess of an attorney's deserved compensation, but are an "attempt to calculate more precisely the market value of the services provided by the attorney." *Alabama Power Company v. Gorsuch*, 672 F.2d 1, 6 n.28 (D.C. Cir. 1982). Plaintiffs, of course, bear the burden of justifying the increases they seek by identifying clearly the particular circumstances of the case that warrant the proposed adjustments. *Copeland*, 641 F.2d at 892; *Concerned Veterans*, 675 F.2d at 1328.

A. Quality of Representation

Two distinct factors may justify an increase in the lodestar to reflect the quality of representation afforded

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[41] The Court addresses these two factors separately, *infra*, under the headings "The Risk Premium" and "Delay in Receipt of Payment."

the prevailing plaintiff: An upward adjustment for quality is appropriate when the attorney (1) performed exceptionally well or (2) obtained an exceptional result. *Copeland*, 641 F.2d at 894. It is clear, however, that quality adjustments are not granted routinely or liberally, but are reserved for truly exceptional cases. *Concerned Veterans*, 675 F.2d at 1329; *Donnell v. United States*, 682 F.2d 240, 254 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1190 (1983). An adjustment is not merited simply because counsel competently pursued the litigation to a successful conclusion, 682 F.2d at 255, or obtained an enormous dollar recovery, 641 F.2d at 894, but is appropriate only in the rare instances where an attorney's performance is not accurately reflected in the lodestar calculation. Thus,

> [a] quality adjustment is appropriate only when the representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rate used to compute the "lodestar."

Copeland, 641 F.2d at 893. Similarly, an adjustment for exceptional results is merited only where, taking into account the hourly rate commanded and the number of hours expended, the results are substantially better than could reasonably have been expected. *Copeland*, 641 F.2d at 894; *Donnell*, 682 F.2d at 255 n.51. When viewed in light of these standards, Plaintiffs' request for a 100% quality adjustment does not withstand scrutiny.

Every individual involved in or familiar with this lawsuit acknowledges that Plaintiffs' counsel are first-rate lawyers. They are extremely experienced, extraordinarily capable attorneys who provided Plaintiffs with legal representation of the highest caliber. For these reasons, Plaintiffs requested and have been awarded compensation at hourly rates commensurate with the most experienced, highly respected, and capable attorneys in the

District of Columbia. And for *that* reason, no additional increase to compensate for the quality of counsels' performance is warranted.

Plaintiffs' counsel clearly performed with distinction, but that is no more than the Court or Plaintiffs would demand of counsel earning up to $175 per hour. Counsels' legal acumen and impressive performance in this case are "precisely what one would expect from an attorney particularly experienced in this field serving as a party's lead counsel in a complex litigation," *Donnell*, 682 F.2d at 255, and are fully accounted for in the lodestar rates.

The results obtained in this case also are consistent with the caliber of representation provided by counsel and the number of hours devoted to the case. This Court is reluctant to endorse Plaintiffs' claim that its counsel "conducted the litigation of this case in remarkably efficient fashion," devoting fewer attorney hours to the case than might be expected from the complexity and magnitude of the tasks. Assuming, however, that counsel did litigate this action in fewer hours than most attorneys would have required, that probably is attributable largely to counsels' decision to utilize the talents of its more knowledgeable, experienced partners for the bulk of the tasks. The Court has indicated already that this allocation of resources was not unreasonable, and it does not mean to intimate otherwise here. The Court notes only that, taking into account the generous hourly rates awarded for over 13,300 hours of counsels' time, the favorable result in this litigation was not truly exceptional.[42]

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[42] Plaintiffs suggest that the results were exceptional because, despite complex, uncertain legal and factual issues and a most formidable and determined opposition, they obtained "the largest backpay award in the history of Title VII and/or the Equal Pay Act." Plaintiffs' Application at 144. In short, Plaintiffs maintain that "[n]o one could conceivably have 'reasonably . . . expected'

The Court's conclusion that no quality adjustment to the lodestar is appropriate is not intended to impugn the quality of counsels' legal services or to denigrate the doctrinal or practical significance of this lawsuit. The case was an important one which furthered the goals of both Title VII and the Equal Pay Act; it simply was not "exceptional" as that term has been defined by the Court of Appeals in this Circuit. *See Donnell*, 682 F.2d at 255 n.51.

B. The "Risk Premium"

Where a prevailing plaintiff's counsel litigates Title VII claims on the understanding that it will receive no significant remuneration unless the lawsuit is successful, an upward adjustment in the lodestar is appropriate "to compensate for the risk that the lawsuit would be unsuccessful and that no fee at all would be obtained." *Copeland*, 641 F.2d at 892. The "contingency adjustment" or "risk premium" is a percentage increase in the lodestar [43] and "is designed solely to compensate for the possibility *at the outset* that the litigation would be

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that plaintiff[s] would prevail to the extent they have in this case." *Id.* at 145. The short answer to this assertion is that "the complexity and uncertainty of the issues in the case are considerations in determining whether there was a possibility that no fees would be recovered and therefore whether a *contingency* adjustment is appropriate." *Donnell*, 682 F.2d at 254 (footnote omitted) (emphasis added); they do not justify an adjustment for the quality of representation.

[43] Where the hourly rates used in calculating the lodestar include an allowance for the possibility that the suit would not succeed and no fee would be obtained, no percentage adjustment for risk is appropriate. Copeland, 641 F.2d at 893; Concerned Veterans, 675 F.2d at 1328. The prevailing rates awarded in this case, however, do not incorporate a risk factor. They are the rates paid on a regular basis to lawyers whose skill and experience are comparable to those of Plaintiffs' counsel, without regard to the outcome of the litigation. Thus, the lodestar calculation here does not account for the risk of not prevailing.

unsuccessful and that no fee would be obtained." [44] *Id.* at 893 (emphasis added). Although the inquiry is "difficult in hindsight," *id.*, the Court must assess the "actual probability" that the fee applicant would have lost the case and recovered no fee. *Donnell*, 682 F.2d at 254 n.43.

There is no dispute here that counsels' receipt of fees depended upon the successful termination of the litigation and that Plaintiffs therefore are *entitled* to a risk adjustment. *See Concerned Veterans*, 675 F.2d at 1328. It remains only for the Court to ascertain the amount of the "risk premium" that should be awarded. Although this task is "inherently imprecise" and necessarily entails "certain estimations," *Copeland*, 641 F.2d at 893, it is incumbent upon Plaintiffs to "identify the specific circumstances of the case which support a risk adjustment in the amount requested." *Concerned Veterans*, 675 F.2d at 1328.

In order to assess the risk that Plaintiffs' counsel accepted at the outset of this litigation, the Court must consider not only the probability of success but what was being risked. The former category requires an evaluation of (1) the legal and factual complexity of the case; [45] (2) the probability of defendant's liability, including whether it has been suggested by previous proceedings and whether it is asserted under existing case law or is advanced as a novel theory; and (3) the difficulty or ease with which damages (if any) could be proven. *See Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.* (Lindy II), 540 F.2d 102, 117 (3d Cir. 1976). The latter category in-

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[44] The risk described in Copeland is not, as Defendant suggests, the risk of "severe financial dislocation" or of financial ruin. It is simply the risk that services will be provided without ever receiving compensation. Plaintiffs' counsel undertook that risk and shall be compensated accordingly.

[45] *See* Donnell, 682 F.2d at 254.

cludes the number of hours and the amount of out-of-pocket expenses risked without guarantee of compensation. *Id.*

The Court's review of these factors, in light of the documentation incorporated in Plaintiffs' fee application and the Court's own intimate familiarity with the litigation, suggests that a risk adjustment of 100 percent is appropriate.

When Plaintiffs' counsel agreed to undertake this lawsuit thirteen years ago, they did so with the understanding that they would not be compensated for their labor unless they ultimately prevailed on the merits and that, in any event, they would receive no payment until the case was concluded. They had every reason to anticipate then that the case would require a substantial investment (both in time and out-of-pocket expenditures) over an extended period.[46] The case was contemplated as a class action on behalf of over 3,300 flight attendants; the alleged statutory violations touched virtually every aspect of Defendant's employment practices and raised a multitude of legal and factual issues; and the outcome of these issues was far from preordained. No prior government or private proceeding had suggested Defendant's liability or had even developed the facts of the case; Plaintiffs' counsel had to conduct their own extensive investigation and discovery, and they simply could not know at the outset of their representation how the critical facts would develop.[47] *See Lindy II*, 540 F.2d at 117.

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[46] *Cf.* Affidavit of Richard Sobol, Defendant's Exhibit 20. Mr. Sobol, a "well known Title VII litigator," indicates that employment discrimination cases "are ordinarily very prolonged. Cases lasting ten or fifteen years . . . are not uncommon." Sobol Affidavit ¶ 12, Sobol Declaration ¶ 2. *See* NWA Submission at 77-78.

[47] Plaintiffs' counsel correctly anticipated "swearing contests" between Defendant's officials and members of the plaintiff class concerning a number of factual issues. According to Gottesman, however, that was only one of the factual obstacles littering coun-

Moreover, the case was brought at an early stage in the development of the law under Title VII and the Equal Pay Act. There were few significant legal precedents interpreting either of the statutes and none from the United States Supreme Court. Thus, Plaintiffs' counsel could not know or reliably predict what the controlling standards would be.[48]

Finally, Plaintiffs knew they were facing a large, well-financed corporate defendant with a policy and history of tenaciously defending cases brought against it. This fact, combined with the unsettled state of the law, presaged a protracted battle in both the trial and appellate courts. And Plaintiffs' counsel knew at the outset that the battle would be waged on Defendant's behalf by extremely capable counsel. Thus, Plaintiffs' counsel knew from the beginning that they would be met with a maximum legal effort both in terms of the quality of defense counsel and the vigor with which Defendant would litigate the action, and that nothing less than the same effort would be required of them.[49]

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sels' path: "[A]s we had not yet had the benefit of discovery, we could not evaluate the weight that *documentary* evidence might have in corroborating the testimony of Northwest's witnesses. We knew . . . that there were documents supporting Northwest's position on the equal pay issue; for all we knew, there might be documents supporting its position on the other factual issues as well—perhaps even documents that conclusively established the correctness of its version of the facts." Gottesman Affidavit at 34-35.

[48] The fact that there was no controlling Supreme Court precedent magnified the risks in several aspects. First, it made extended appeals a virtually certainty. Second, the absence of an authoritative interpretation of the law raised the possibility that intervening appellate decisions might alter the legal principles that were developing in the lower courts, or that might be developed in this very case.

[49] Plaintiffs' expectations clearly have materialized. Defendant has vigorously and unremittingly litigated every aspect of this case. No contested issue was won easily and precious few were

The Court is mindful that the issues of first impression in this case cannot form the basis of an adjustment to the lodestar. *Donnell*, 682 F.2d at 253-54. The Court is also cognizant of the relationship between the difficulty of the case and the lodestar.[50] But when a case involves complex and uncertain issues, that fact *does* inform the Court's decision on the entitlement to and size of a risk adjustment, and it is apparent that this litigation was fraught with such issues. Although the Court is loath to attempt to quantify the risk undertaken, it appears that Plaintiffs' likelihood of success was approximately 50%.[51] When the Court factors into the calculus the

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conceded; every conceivable argument and defense was advanced (and, in some instances, advanced more than once) by counsel of the highest caliber. Even now, in the third round of appeals, Defendant continues to litigate issues that were decided in this Court's 1974 liability ruling and affirmed by the Court of Appeals in Laffey v. Northwest Airlines, Inc., 567 F.2d 429, *cert. denied*, 434 U.S. 1086 (1978). *See* Brief for Northwest Airlines, Inc., Laffey v. Northwest Airlines, Inc., Nos. 83-1033, 83-1034, and 83-1168 (filed June 8, 1983).

[50] "If a case was particularly difficult, it probably required a large number of hours of attorney time, a factor which will show up in the lodestar calculations. And if especially talented counsel were necessary to litigate the case, this fact will be reflected in the hourly rate used in setting the lodestar fee." Donnell, 682 F.2d at 253-54 (footnote omitted).

[51] The uncertainties counsel faced in terms of credibility disputes and the governing legal standards unquestionably injected an element of risk into the case. The Court does not believe, however, that the deck was as stacked against Plaintiffs as their fee application suggests; the legal and factual issues could have been resolved in either parties' favor with approximately equal probability. For example, the Court rejects Plaintiffs' suggestion that Defendant's corporate officials are inherently more credible than their plaintiff-employees and that, therefore, the likelihood that Plaintiffs would triumph in the credibility battles was "realistically . . . less than 50%." Plaintiffs' Application at 127.

It is noteworthy, however, that until the entry of this Court's remedial order in 1974, Defendant apparently did not believe that

magnitude of the undertaking and, consequently, the number of hours counsel placed at risk, it is apparent that Plaintiffs are fully deserving of 100% contingency adjustment. *See McDonald v. Johnson and Johnson*, 546 F. Supp. 324 (D. Minn. 1982). *See also* Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U.Pa.L.Rev. 281 at 324-26.

C. Delay in Receipt of Payment

The Court of Appeals recognized in *Copeland* that the hourly rates used to calculate the lodestar "represent the prevailing rate for clients who typically pay their bills promptly," while "[c]ourt-awarded fees normally are received long after the legal services are rendered." 641 F.2d at 893. It therefore authorized an adjustment to the lodestar to recompense a successful plaintiff for the loss occasioned by the unavoidable, yet costly, delay.

Plaintiff identifies two components to the loss caused by delay in the receipt of payment:

> The first is that inflation erodes the value of the dollar so that $100 in 1983 is not the same as $100 in 1970; the second is that the use of the money during the period of delay is lost—in other words, whatever that money could have been used for during that

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Plaintiffs stood a significant chance of prevailing. For the first three and one-half years of the lawsuit, Defendant made no report to its stockholders respecting the lawsuit, as it would have been required to do had it considered the suit to have the potential of a material effect on its finances. Indeed, despite this Court's entry of a $52 million backpay award against it, it appears that Defendant still faces this action with a good measure of optimism; in a filing with the Securities and Exchange Commission at the close of 1982, Defendant described its potential liability as follows: "The ultimate outcome of the litigation cannot be predicted and, therefore, no specific amount of ultimate liability may be estimated as probable. The Company estimates that its ultimate liability may range from approximately $1 million to approximately $52 million." *See* Plaintiffs' Application at 117-118, 135.

> period, or could have earned during that period above and beyond keeping up with the inflation rate, is lost.

Plaintiffs' Application at 136. Plaintiffs assert that an award of counsels' current rates for all hours devoted to this litigation would "roughly account for the inflation that has occurred in the period of delay," but maintain that it would not compensate for the loss of the use of the money. Thus,

> even after correcting the inflation, it is necessary to provide an additional adjustment estimated at 2% per year to fully compensate plaintiffs' counsel for the failure to receive fees on a prompt and regular basis during the period of this case.

Plaintiffs' Application at 137.

It is clear that Plaintiffs are entitled to a substantial adjustment for delay. This action was filed in 1970 and has been litigated vigorously and almost continuously ever since.[52] Plaintiffs' counsel have yet to receive one penny of compensation for over 13,300 hours of work.[53]

The issue dividing the parties, however, is not whether *any* delay adjustment is appropriate, but whether the Court may compute the lodestar based on counsels' current hourly rates and then increase the lodestar to account further for delay. Defendant contends that Plaintiffs' "two-tiered" approach constitutes "double-counting" that is explicitly forbidden in this Circuit.

Copeland raised the possibility that both adjustments could be made when it suggested that

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[52] And the drama still has not reached it denouement. The parties appealed the Court's judgment of November 30, 1982 and will doubtless pursue the same course with the fee award. Plaintiffs' counsel should not anticipate banking their fees in the near future.

[53] Although many of the hours for which Plaintiffs seek compensation were logged in recent years, many were expended in the first several years of the litigation.

> if the "lodestar" itself is based on *present* hourly rates, rather than the lesser rates applicable to the time period in which the services were rendered, the harm resulting from delay in payment may be largely reduced or eliminated.

641 F.2d at 893, n.23. And in *EDF v. EPA*, the Court of Appeals itself fashioned such an award.[54] Shortly thereafter, however, the Court issued the unambiguous directive that "where the hourly rate used in computing the lodestar is based on present hourly rates a delay factor has implicitly been recognized and no adjustment for delay should be allowed." *Concerned Veterans*, 675 F.2d at 1329. That pronouncement was followed two months later by an approving citation to the original *Copeland* language. *Donnell*, 682 F.2d at 254. In short, the Court of Appeals has not spoken consistently on this subject.

The Court concludes that where a fee applicant can demonstrate that an award of counsels' current hourly rates only partially compensates for the losses occasioned by delay, the Court can and should grant an additional adjustment to the lodestar to arrive at a fee that is fully compensatory. Although this approach appears to be at odds with *Concerned Veterans*, it is in full accord with *Copeland*, *EDF v. EPA*, and *Donnell* and with the underlying compensatory purpose of Title VII fee awards.[55]

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[54] The Court awarded counsel their current rates for all hours devoted to the litigation and then increased the lodestar by 17% to reflect both the "benefits to the public from suit" and delay in receipt of payment. 672 F.2d at 59-60. Slightly less than three years had elapsed between the time the suit was filed and the fee award.

[55] The goals of Title VII are not realized by a miserly approach to the fee award, but through awards that represent the full value of the legal services rendered. Indeed, awarding counsel less than a "full fee award" could have deleterious consequences. *Cf. Copeland*, 641 F.2d at 899.

The record before this Court, however, does not justify such an increase.

The declaration of economist Harriet Zellner, on which Plaintiffs rely, does not substantiate Plaintiffs' claim that an award of current hourly rates significantly underestimates the actual losses caused by delayed payment; it appears that Zellner simply *assumed* that current rates correct for inflation and, on that premise, proceeded to her conclusion that an additional 14% lodestar adjustment is necessary. Her "expert" opinion, therefore, does not provide the specific documentation for lodestar increases that *Copeland* and its progeny require.[56]

The Court has awarded Plaintiffs the hourly rates prevailing in 1983 for all hours their counsel have invested in this litigation since 1970. The Court finds that this adjustment approximates and fairly compensates Plaintiffs for the losses caused by a delay in payment of over 13 years. Nothing in the record demonstrates otherwise.[57]

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[56] The affidavit from Stephen Brenner, Defendant's economist, is also of limited value. Although Brenner concludes that counsels' current hourly rates account for *both* inflation and the use of money, the calculations on which he bases his opinion are based upon counsels' historic rates, rather than the market rates awarded by the Court.

[57] The Court rejects Defendant's suggestion that a portion of the delay was attributable to Plaintiffs' dilatory tactics and should be disregarded. Defendant may have been prepared to initiate the fee litigation in February 1978, but this Court deemed Defendant's timing inappropriate. Defendant cannot seriously expect this Court to penalize Plaintiffs for postponing their fee application when that course of action was explicitly approved by the Court. In any event, beginning the fee negotiations in February 1978 would not have eliminated the last 4½ years of delay, for the parties were still actively litigating the remand issues until November 30, 1982.

The Court also discards Defendant's suggestion that the delay adjustment should be reduced because the delay in this case was not unique. This argument simply is beside the point. The purpose of a delay adjustment is to compensate for losses that are caused by

V. Litigation Expenses

Plaintiffs request an award of $256,650.14 for "reasonable litigation expenses" incurred during the course of this action. Under this rubric, Plaintiffs seek compensation for 4,319 hours of paralegal and law clerk time, counsels' direct out-of-pocket expenditures, and a variety of expenses incurred by the named plaintiff, Mary Pat Laffey. Defendant challenges all but $127,959.23 of this amount on the grounds that the claims fall outside the category of compensable litigation expenses, are "demonstrably unreasonable," or are insufficiently documented. The following table summarizes the parties' positions:

	Amount Requested	NWA's Proposal
BREDHOFF & KAISER		
MERITS ISSUES		
Paralegals/Clerks	$ 76,290.15	$ 76,065.00
Disbursements	101,183.84	29,390.04
Sub-Total:	$177,473.99	$105,455.04
ATTORNEYS' FEE ISSUES		
Paralegals/Clerks	$ 27,529.50	$ 9,244.50
Disbursements	4,960.32	608.81
Sub-Total:	$ 32,489.82	$ 9,853.31
ARNOLD & PORTER		
Paralegals/Clerks	$ 25,770.00	$ 10,061.25
Disbursements	20,916.33	2,589.63
Sub-Total:	$ 46,686.33	$ 12,650.88
Total:	$256,650.14	$127,959.23

A. Disbursements

The focal point of Defendant's challenge to Plaintiffs' disbursements is its contention that recoverable litigation

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anything more than minimal delay in the receipt of payment. Concerned Veterans, 675 F.2d at 1328. Counsels' ability to foresee the delay in no way lessens the losses caused by the passage of time and it has no bearing on either entitlement to, or the amount of, a delay adjustment.

expenses under the Title VII fee-shifting statute are limited to items that are taxable costs under 28 U.S.C. § 1920. According to Defendant, the bulk of Plaintiffs' out-of-pocket expenses fall outside the scope of such costs and therefore are not compensable.[58]

A number of courts have held that where attorneys' fees are authorized expressly by statute, recoverable litigation expenses are not limited to taxable costs. *See, e.g., Dowdell v. City of Apopka*, 698 F.2d 1181, 1188-89 (11th Cir. 1983); *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1100 (5th Cir. 1982); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 623 (4th Cir. 1978). These courts reason that awarding a prevailing party its attorneys' fees but denying compensation for expenses incident to the litigation would be "anomalous." *Copper Liquor*, 684 F.2d at 1100.

> [A]ttorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys.

Dowdell, 698 F.2d at 1190. Moreover, refusal to compensate plaintiffs for their out-of-pocket costs and expenses would not effectuate the policies underlying the Title VII fee shifting statute: to encourage individuals to seek vindication of their rights, to ensure individuals who prevail in such litigation that they will be fully compensated for their efforts, and to inspire competent counsel

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[58] Defendant contends that expenditures for telephone, messenger services, non-attorney overtime, word processing, local transportation, postage, and travel are non-compensable; costs associated with reproduction, printing & transcripts, expert witnesses, and "miscellaneous" items are only partially compensable under Defendant's scheme.

to accept representation in such cases.[59] *Wheeler v. Durham*, 585 F.2d at 623-624; *Dowdell*, 698 F.2d at 1190.[60]

Although the Court of Appeals for this Circuit has not addressed the issue directly, in *Alabama Power Company v. Gorsuch*, 672 F.2d 1, 5 (D.C. Cir. 1982), it approved reimbursement for some of the same types of expenses Plaintiffs claim here: postage, reproduction, travel and meals.[61] This Court concludes that the objectives of Title VII attorney fee awards and the precedent in this Circuit support a fully compensatory award, which necessarily includes all expenses incident to the litigation that are normally billed to fee-paying clients, are reasonably incurred in the litigation, and are sufficiently documented. Because Plaintiffs' affidavits establish that the expenses for which they seek reimbursement are customarily billed to fee-paying clients,[62] the Court's attention shifts to the latter two factors.

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[59] *See* Dowdell, 698 F.2d at 1190: "[I]f the real income of civil rights litigators is decreased because they must absorb costs which are generally billable in other types of cases, the market result will be to channel attorneys toward more remunerative types of litigation. Decreasing the supply of attorneys necessarily decreases the access to the courts of victims of civil rights violations." The Court concluded that refusing compensation for all reasoanble expenses would "penalize attorneys for undertaking civil rights litigation." *Id.* at 1191.

[60] Although Wheeler and Dowdell involved fee awards pursuant to 42 U.S.C. § 1988, the rationale for the courts' rulings on plaintiffs' litigation expenses is equally applicable to attorney fee litigation under Title VII; the wording of the statutes is virtually identical.

[61] Other courts in this District also have awarded reimbursement for such expenses. *See e.g.*, Parker v. Califano, 443 F. Supp. 789, 797 (D.D.C. 1978) ("reasonable out-of-pocket expenses," including photocopying, transportation, postage and telephone costs).

[62] *Cf.* American Jewish Congress v. Kreps, No. 75-1541, slip op. at 10 (D.D.C. Oct. 16, 1981): "Private firms routinely bill their clients for telephone charges, duplicating costs and the like."

Defendant contends that Plaintiffs' out-of-pocket expenses are so sparsely documented as to render them non-compensable. It asserts that the lack of descriptive or explanatory detail with regard to many of the expenses makes it impossible for it (and the Court) to discern what the expenditures were for and whether they were reasonably incurred.[63]

Defendant evidently misperceives the documentation required of fee applicants. It is not necessary for plaintiffs to explain the purpose of every photocopy that is produced and every expenditure that is made in connection with the litigation. For most out-of-pocket costs, it is enough for plaintiffs to identify the expenses by category, with a general description of the types of charges included in each category. In the case of particularly large or unusual expenditures, some additional explanation of the purpose of the expense may be necessary, but this is not the norm. *Copeland* specifically admonished trial courts to avoid "becom[ing] enmeshed in a meticulous analysis of every detailed facet of the professional representation." 641 F.2d at 896 (quoting Lindy II, 540 F.2d at 116). This admonition applies equally to the Court's assessment of the lodestar components and to its inquiry into the reasonable costs of the litigation.

The Court has reviewed Plaintiffs' tabular and descriptive summaries of their expenses and concludes that, in most instances, the documentation provided is sufficient. Plaintiffs have compiled at daily break-down of all expenditures made by Bredhoff & Kaiser from July 31, 1971

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[63] Much of Defendant's dissatisfaction with Plaintiffs' documentation stems from its contention that only taxable costs under 28 U.S.C. § 1920 are compensable; since Plaintiffs' records do not itemize these "taxable costs" separately from the remainder of its costs, Defendant contends that the entire amount claimed for expenses must be disallowed. This Court does not accept Defendant's taxable cost argument and, to that extent at least, Defendant's complaints about the adequacy of the documentation are ill-founded.

to the present;[64] each expense is allocated to one of ten categories of expenditures.[65] The expenditures made by Arnold & Porter in connection with the fee litigation are summarized by category. Affidavits from Messrs. Gottesman and Rezneck expound upon the types of expenditures —and in some instances, the specific charges—included in the various categories for which reimbursement is sought. With the few exceptions noted below, more detailed informaton is neither necessary or useful. Indeed, the amount of time that would be required to document each item of expense in the detail apparently suggested by Defendant would be prohibitive; the compensable time required to generate the detail would exceed the expenses claimed. Neither *Copeland* nor *Concerned Veterans* contemplated such an absurd result and this Court will not require it.[66]

Having said this, however, several items of expense deserve mention, either because they belong to one of the few categories for which documentation truly is lacking or because they were not reasonably incurred.

First, Plaintiffs seek compensation for $986.64 in "miscellaneous" charges incurred prior to July 31, 1971. Gottesman concedes that the "bookkeeping records for that

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[64] Expenditures prior to July 31, 1971, totalling $986.64, are listed as "miscellaneous" expenses for which "no back-up or breakdown" is available. As noted later in this section, these hours are compensable nonetheless.

[65] The categories include telephone, messenger services, word processing, support staff overtime and secretary fees, reproduction, postage, attorney and attendant travel, printing and transcripts, expert and local counsel, and miscellaneous.

[66] It is somewhat ironic to find Defendant clamoring for *more* supporting information. After complaining that Plaintiffs have beseiged the Court with superfluous documentation and transformed a seemingly "straightforward" fee application into a full-blown (indeed, over-blown) litigation, Defendant urges the Court to demand a level of documentation that would tend toward the same result.

period are terse and back-up materials are missing," but has attempted to reconstruct the expenditures. He notes that the first year of litigation involved a filing fee and duplication costs for all initial pleadings; numerous long-distance telephone conversations with cabin attendants who wished to become plaintiffs and with Defendant's Minneapolis counsel; and, most important, preparation and mailing of two class notices (with postage-paid return envelopes) to over 1,500 cabin attendants.

Although counsel cannot provide more specific documentation for these items of expenditure, it is apparent that these tasks *were* performed and that they involved substantial outlays of funds by Plaintiffs' counsel. In this instance, the Court is "content to rely upon the integrity of counsel, and allow these expenses." *See Alabama Power Company v. Gorsuch*, 672 F.2d at 5 (footnote omitted).

Of the remaining $682.77 in "miscellaneous" expenses, some of the entries have no identifying notations and others note only that the money went to "supplies." Since the cost of attorneys' supplies typically is subsumed in the hourly rates, some additional explanation of these purchases is necessary to render them compensable.[67] Similarly, without some indicaton of the nature of the other miscellaneous expenses, they must also be disallowed.

Second, Plaintiffs request an award of $807.04 for printing costs and filing fees incurred in the *Laffey I* appeal. The Court of Appeals expressly denied reimbursement for these expenditures on the ground that Plaintiffs' bill of costs was filed untimely. *Laffey v. Northwest*

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[67] The Court encounters the same difficulty with the request for $3,041.72 of "word processing" costs. The Court is under the impression that support services of this sort are part of the overhead costs that are generally included in an attorney's hourly rate. Therefore, without some additional explanation of the costs (including some indication that attorneys routinely bill clients for these services separately) they must be excluded from Plaintiffs' reimbursable costs.

Airlines, Inc., 587 F.2d 1223 (D.C. Cir. 1978). This Court cannot and will not disregard that ruling.

Third, Plaintiffs' counsel includes in their expenses duplication fees, transportation costs, and messenger charges incurred while compiling affidavits in support of the fee application. As noted in Part II-D(1), *supra*, these affidavits were not all reasonably necessary to the prosecution of the fee application, and a portion of the attorney time devoted to their collection was excluded from Plaintiffs' proposed lodestar total. It follows that out-of-pocket expenditures claimed in connecton with the affidavits should be similarly reduced; the Court estimates that $600 in transportation costs, $2,500 in duplication charges, and $200 worth of messenger services are attributable to these tasks and therefore shall be disallowed.[68]

Fourth, Arnold & Porter seeks reimbursement of $4,739.00 for the services of several consultants. Rezneck's supplemental affidavit indicates that $2,790.00 of this sum was paid to Mr. Beverly Moore, editor and publisher of *Class Action Reports*, who was consulted concerning lodestar awards and adjustments in cases similar to *Laffey*. The consultation culminated in an affidavit that was appended as an exhibit to Plaintiffs' Reply Brief. The Court has reviewed Moore's affidavit and concludes that his services were not reasonably necessary to the conduct of the fee litigation. Neither the Court nor counsel needs an "expert" to review and compare the lodestar adjustments awarded in other cases. In any event, such adjustments are uniquely geared to the facts of each case

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[68] Plaintiffs note further that a portion of Arnold & Porter's transportation expenses were generated by trips "to and from Bredhoff & Kaiser to deliver documents and drafts of court papers and for periodic consultations." For the reasons set forth in Part II-D(2), *supra*, this portion of the transportation expenditures is not compensable. An additional $200 shall be subtracted from Plaintiffs' compensable expenses.

and an extensive study such as Moore conducted is simply of little value to the Court. Defendant should not be saddled with this expenditure.

Another $500 in consulting fees was paid to Frederick Amling, a professor of business finance at George Washington University, who was consulted on the "economics of risk analysis." The Court is not persuaded that this consultation was reasonably necessary for the thorough presentation of Plaintiffs' fee request, and the monies paid to Dr. Amling therefore will not be reimbursed.

Fifth, Plaintiffs' expense roster includes $6,344.95 for support staff overtime (including assocated meals and transportation) for which they are not entitled to reimbursement. The Court does not suggest that overtime charges are never an appropriate component of a court-awarded fee. Such expenses, however, are in the nature of an exceptional expenditure and require some justification before they can be assessed against the losing party. *See Wheeler v. Durham Board of Education*, 585 F.2d at 623, n.7.

Sixth, Arnold & Porter seeks compensation for $4,822.25 in charges for LEXIS computer assisted research. A portion of this sum doubtless is attributable to the eighteen page print-out of every case that has ever cited the *Laffey* decision (an attempt on Plaintiffs' part to persuade the Court of the importance of the lawsuit). *See* Exhibit C, Appendix III to Plaintiffs' Application. The remainder of the charges is apparently for various research projects performed by Arnold & Porter on the fee issue—this in addition to the hours of traditional, manual research for which compensation is sought. Plaintiffs' assertion that all of this research was reasonable and necessary simply strains credulity; they shall receive compensation for only $2,000 in LEXIS charges.

Finally, an unspecified portion of Plaintiffs' reproduction expenses are attributable to copies of legal research

material made by counsel for their own use. It appears that such copies are principally a matter of convenience for the attorneys—rather than necessity—and the Court is not persuaded that Defendant should foot the bill for these expenditures. The Court accepts Gottesman's estimate that approximately 20% of his firm's reproduction costs are attributable to this type of activity [69] and reduces Plaintiffs' reimbursable expenses accordingly. The Court estimates that 10% of Arnold & Porter's duplication charges are attributable to copies of this sort and adjusts the awardable expenses accordingly.[70]

The total amount of compensable disbursements is $93,822.12.

B. Ms. Laffey's Expenses

Plaintiffs seek $7,861.38 on behalf of the named Plaintiff, Mary Pat Laffey, for expenses she incurred as a result of this litigation. Approximately one-third of this sum is for actual out-of-pocket expenditures necessitated by Laffey's active participation in the case.[71] The remainder represents wages that Ms. Laffey allegedly would have received had she not been obliged to take days off from her job to attend depositions, settlement conferences and trial and to assist otherwise in the litigation.

Defendant objects strenuously to the requested amounts. It contends that the lost wage claim is not a recoverable cost, that it is an untimely request for back-pay, and that, in any event, the request is inadequately documented, since the application contains no explanation of how the lost-salary figure was calculated. De-

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[69] *See* Second Gottesman Affidavit at 42.

[70] A total of $4,888.26 in duplicating costs—$3,973.60 of Bredhoff & Kaiser's charges and $914.66 of Arnold & Porter's—are deducted from Plaintiffs' compensable expenses.

[71] These items include telephone, postage, and travel expenses totaling $2,292.01.

fendant apparently relies upon its "taxable costs" argument to defeat Plaintiffs' claim for Laffey's out-of-pocket expenses. Neither argument is persuasive.

As noted in Part V-A, *supra*, the Court rejects Defendant's assertion that Title VII authorizes only an award of taxable costs delineated at 28 U.S.C. § 1920. Gottesman's Second Affidavit explains the purpose of Ms. Laffey's telephone, postage and travel expenses to this Court's satisfaction. Because she was a named plaintiff in this suit, it was inevitable that Ms. Laffey would participate in the development and trial of the case; indeed, it was incumbent upon her to do so. This Court is unwilling to penalize her for accepting that role and actively assisting counsel in the case. Plaintiffs are entitled to an award of $2,292.01 for Ms. Laffey's out-of-pocket expenditures.

The remainder of Laffey's expense request is attributable to her lost salary claim. Plaintiffs' counsel explains this item as follows:

> NWA correctly notes . . . that cabin attendants often can arrange or trade schedules to avoid a salary loss when unavailable for flying on particular days. Laffey in fact attempted to do so on every occasion, and in consequence the major part of her participation in this lawsuit was accomplished without any loss of salary. The claim for lost salary relates to those few instances in which it was *not* possible for Laffey to avoid a salary loss through these devices. In each of the latter instances, Laffey's absence was specifically approved by NWA, and was recorded on her records as a leave of absence.

Second Gottesman Affidavit at 45-46. The affidavit goes on to explain the method by which the salary loss was computed and notes that "Laffey checked all of the computations with supervisory personnel in NWA's Seattle office to assure their accuracy." *Id.* at 46. Although

Gottesman does not set out the actual computations in his affidavit, the tabulation of Ms. Laffey's expenses itemizes the amounts of lost salary for each month in which a loss is claimed. The Court finds this documentation adequate.[72]

The only substantial question before the Court, therefore, is whether Ms. Laffey's lost salary is a compensable item of expense.[73] Despite Defendant's vociferous argument to the contrary, this Court believes that it is a legitimate expense for which Plaintiffs are entitled to compensation. *See Sebastian v. Texas Department of Corrections*, 541 F. Supp. 970, 978-79 (S.D. Tex. 1982); *Davis v. Bolger*, 496 F. Supp. 559, 563-58 (D.D.C. 1980).

C. Law Clerk and Paralegal Hours

1. Merits Hours

Of the 2,543 hours worked by law clerks and paralegals on the merits, Defendant challenges only 7.5 hours devoted to Plaintiffs' motion to apply the District of Columbia statutory rate of post-judgment interest.[74] The

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[72] Defendant has before it the information necessary to assess the accuracy of Plaintiffs' calculations, including the months in which Ms. Laffey took leaves of absence, the amounts she claims to have lost in each month, and its own payroll records. The Court finds it significant that Defendant has made no effort to challenge the calculations as inaccurate.

[73] Defendant correctly notes that characterizing the lost salary claim as a disguised request for additional backpay "really does not fit." NWA Submission at 110. Plaintiffs' effort to secure compensation for the wages Ms. Laffey lost while pursuing this action is clearly distinct from the award of backpay for the Title VII and Equal Pay Act violations that were the subject of this lawsuit.

[74] Defendant does not object to the proposed rate of $30 per hour for paralegal and law clerk time. Based upon the documentation submitted by Plaintiffs in conjunction with the application, the Court concludes that this figure is a fair and reasonable compensation for these individuals' time. It is the rate charged to most

Court already determined that the attorney hours devoted to this so-called "lost issue" are fully compensable; the same ruling applies to the law clerk hours spent on the same issue.

2. Attorneys' Fee Hours

Plaintiffs claim compensation for 1,776.65 hours worked by paralegals and law clerks on the attorneys' fee issues; 917.65 of the hours are attributable to Bredhoff & Kaiser's personnel, 859 hours to Arnold & Porter's. Defendant objects to 1,133.125 of these hours on three grounds; only one of its contentions has merit.

Defendant complains that 168 hours were devoted to "unnecessary" attorney fee discovery. This Court ruled in Part II-D(3), *supra*, that reasonable attorney hours devoted to fee discovery—both offensive and defensive—are compensable; the same is true of paralegal and law clerk hours. There is no suggestion or indication that the number of hours committed to these tasks is unreasonable, and therefore they are compensable.

Defendant next argues that there is insufficient documentation for 275.5 hours of Bredhoff & Kaiser's law clerk and paralegal time. A review of Plaintiffs' application, however, reveals no such deficiency. The Second Gottesman Affidavit identifies the individuals whose time records are in question and describes the specific projects to which they committed the disputed hours; a separate exhibit summarizes the individuals' daily time logs. Nothing more is necessary. Indeed, the Court is at a loss to understand what additional information *could* be furnished.

Defendant's final argument challenges the reasonableness of the total number of law clerk and paralegal hours

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of Bredhoff & Kaiser's clients and it is consistent with recent awards in the District of Columbia. *See, e.g.*, Vaughn v. Government Printing Office, C.A. 77-787 (D.D.C. July 19, 1982).

devoted to the fee award. Specifically, Defendant alleges that much of the time spent by law clerks and paralegals at the two firms was duplicative and that one-half of the hours spent on research and data compilation should be eliminated. The Court has reviewed Plaintiffs' time records and concurs that a number of hours either were excessive or unreasonably spent. For example:

—Twenty-two hours of law clerk and paralegal time devoted to inter-firm conferences must be subtracted from Plaintiffs' compensable hours. See Part II-D(1).

—In April 1983, Arnold & Porter brought a new law clerk, Mr. Gordon, into the case. He spent approximately 10.25 hours familiarizing himself with the case and reviewing the fee application. It is unreasonable to bill Defendant for this kind of "start-up" cost so close to the conclusion of the fee litigation.

—An Arnold & Porter paralegal spent the better part of 67 hours reviewing and compiling Arnold & Porter's expenses. Given the "computerized accounting records" maintained by the law firm, *see* Supplemental Rezneck Affidavit, the Court is astonished at the number of hours devoted to this task. Only 37 hours will be included in Plaintiffs' compensable expenses.

—One Bredhoff & Kaiser law clerk spent approximately 200 hours conducting "comprehensive research" of attorney fee cases, including approximately 12 hours of "background" research. This project was completed prior to Arnold & Porter's involvement in the fee dispute, and although a copy of the resulting legal memorandum was provided to the firm, it does not appear to have appreciably reduced its research time. The Court

concludes that this research was not essential to the preparation of the fee application and therefore is not properly compensable.

—Almost 900 additional hours were spent on research and data compilation. This sum does not include the hours of research conducted by attorneys or nearly $5,000 worth of computer-assisted research charges for which Plaintiffs also seek compensation. Given the clarity of the law governing attorney fee awards in this Circuit and the likelihood that the litigation expenses incurred in the action were tabulated as the case proceeded —if only for the internal accounting purposes of the firms—this expenditure of time is excessive. 250 hours shall be eliminated from the compensable total.

The final number of paralegal and law clerk hours for which this Court will award compensation are set forth in the final calculations in Part V, *infra*.

V. Final Calculations

MERITS LODESTAR

Attorney	Hourly Rate	Merits Hours	Merits Fees	Total Merits Fees
Bredhoff	175	—	-0-	-0-
Feldman	150	160.5	24,075.00	$ 24,075.00
Cohen	150	21.5	3,225.00	6,900.00
	175	21.0	3,675.00	
Gottesman	150	3,248.375	487,256.25	876,294.37
	175	2,223.075	389,038.12	
Weinberg	100	37.375	3,737.50	161,937.50
	125	145.25	18,156.25	
	150	933.625	140,043.75	
Petramalo	100	32	3,200.00	46,121.88
	125	331.375	41,421.88	
	150	10	1,500.00	

Attorney	Hourly Rate	Merits Hours	Merits Fees	Total Merits Fees
D. Clark	75	1,817.75	136,331.25	199,981.25
	100	636.50	63,650.00	
P. Clark	100	606.625	60,662.50	72,115.62
	125	91.625	11,453.12	
Collins	75	36.25	2,718.75	80,793.75
	100	780.75	78,075.00	
Gilson	100	53	5,300.00	5,300.00
Brudney	75	75.625	5,671.88	5,746.88
	100	. 75	75.00	
			TOTAL:	$1,479,266.25

ATTORNEY FEE LODESTAR

Attorney	Hourly Rate	Atty. Fee Hours	Total
Bredhoff	$175	10.75	$ 1,881.25
Cohen	175	12.0	2,100.00
Gottesman	175	596.25	104,343.75
Weinberg	150	357.875	53,681.25
Petramalo	150	2.0	300.00
P. Clark	125	12.125	1,515.62
Collins	100	10.5	1,050.00
Gilson	100	2.625	262.50
Brudney	75	52.375	3,928.12
	100	10.75	1,075.00
Rezneck	175	371.875	65,078.12
Burt	150	116.0	17,400.00
Lindon	75	556.125	41,709.38
		TOTAL:	$294,324.99

* * * *

COMPENSABLE COSTS & EXPENSES

Disbursements:		
Merits Issues		$ 88,804.93
Attorney Fee Issues		5,017.19
	Sub-Total	$ 93,822.12
Paralegals & Law Clerks:		
Bredhoff & Kaiser		
Merits Issues	2578.55 hrs x $30/hr. =	$ 77,356.50
Atty. Fee Issues	605.65 hrs x $30/hr. =	$ 18,169.50
Arnold & Porter	658.75 hrs x $30/hr. =	$ 19,762.50
	Sub-Total	$115,288.50
Ms. Laffey's Expenses:		$ 7,861.38
	TOTAL:	$216,972.00

* * * *

TOTAL AWARD OF ATTORNEYS' FEES & COSTS

Merits Lodestar:		$1,479,266.25
100% Multiplier:		1,479,266.25
Attorney Fee Lodestar:		294,324.99
Costs & Expenses:		216,972.00
	TOTAL:	$3,469,829.49

VI. Conclusion

This Court is dismayed at the course this fee litigation has taken. On the one hand is Defendant, who complains that Plaintiffs unnecessarily complicated a "straightforward" application, but then proceeds to advance arguments that, if accepted by this Court, would produce the same result. Defendant has approached this fee petition with an intensity and vigor even greater than that which characterized its litigation strategy on the merits of this action. The Court assumes that Defendant's counsel bills its client (and receives payment) for the massive outlays of time it makes on its behalf; yet Defendant is determined that Plaintiffs' counsel be precluded from doing the same. Quite simply, Defendant has attempted to invoke a double standard for the en-

tirety of this fee litigation—one standard for Defendant's attorneys and quite another for Plaintiffs' counsel.

On the other hand is Plaintiffs' counsel, who plead their inability to objectively appraise their own fee request and their desire to avoid the embarrassment attendant to "tooting their own horns" to decline to prepare their own fee application—after having already devoted hundreds of hours to the task. The result is another layer of attorneys, who, in their fervor to produce a thorough fee application have buried this Court with an avalanche of documentation—all in the name of *Concerned Veterans* and meticulous lawyering. To be sure, future fee applicants in this District may reap the benefits of Plaintiffs' over-zealous approach, but it will not be at Defendant's expenses.

The Court is caught in the midst of this morass, vainly attempting to negotiate the path charted by the Court of Appeals: to avoid allowing fee applications to assume "massive proportions" and dwarf the underlying litigation on the merits; to avoid becoming ensnared in the minute details of the professional relationship under scrutiny; and yet to insist upon specific documentation for every component of the fee award; to explain fully the premises of its "discretionary" judgments; and to state specifically why the fee opponent's claims lack merit.

The parties to this action are not the only ones who devoted inordinate amounts of time to the fee litigation. The judicial system has been "billed" an extraordinary sum for the services of the judicial personnel necessary to sift through the parties' copious submissions and to review and decide this issue. Given the Court of Appeals' insistence upon detailed documentation and explanation—ironically, in connection with judgments that are conceded to be uniquely within the capacity of the trial court and that are theoretically committed to its

discretion [75]—it appears that this protracted fee litigation was inevitable.

An appropriate Order accompanies this Memorandum Opinion.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

DATED: July 29, 1983

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[75] *See* Hensley v. Eckerhart, 51 U.S.L.W. at 4556.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2111-70

MARY PAT LAFFEY, *et al.*,
Plaintiffs

v.

NORTHWEST AIRLINES, INC.,
Defendant

ORDER

(Filed July 29, 1983)

Upon consideration of Plaintiffs' Application for an Award of Attorneys' Fees and Expenses, Defendant's Submission with Respect to the Application for an Award of Fees and Expenses, and all subsequent submissions by the parties in connection with the fee application; the Memorandum Opinion issued this date; and the entire record herein;

It is by the Court this 29th day of July, 1983

ORDERED, that Defendant pay to Plaintiffs the sum of Three Million Four Hundred Sixty-Nine Thousand Eight Hundred Twenty-Nine Dollars and Forty-Nine Cents ($3,469,829.49) in reasonable attorneys' fees and expenses incurred in this action. Payment shall be made within fifteen (15) days of the date of this Order.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-620

MARY P. LAFFEY, *et al.*,
Petitioners,

v.

NORTHWEST AIRLINES, INC., *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 20, 1985.

/s/ Warren E. Burger
Chief Justice
of the United States

Dated this 14th day
of February, 1985

Office-Supreme Court, U.S.
FILED
MAY 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARY P. LAFFEY, *et al.*,

Petitioners,

v.

NORTHWEST AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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No. 84-1655

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARY P. LAFFEY, et al.,

Petitioners,

v.

NORTHWEST AIRLINES, INC.

Respondent.

On Petition for A Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Interest of the Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit

*Letters of consent from both parties to the filing of this brief have been lodged with the clerk of Court.

corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving many facets of the law.

Amicus has a deep interest in the question of the standards by which counsel fee determinations should be made, both as those standards affect the Fund directly

and as they affect private attorneys. In virtually all of the Fund's cases it is associated with attorneys in private practice, mostly in small firms. Our experience establishes that awards of adequate attorneys' fees are absolutely essential for the continuing participation of such attorneys in the enforcement of civil rights. For these reasons, amicus has participated in many of the leading cases involving attorneys' fees questions, both as counsel, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974); Hutto v. Finney, 437 U.S. 678 (1978); and Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974), and as amicus curiae, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Hensley v. Eckerhart,

461 U.S. 424 (1983); Blum v. Stenson, ___ U.S. ___, 79 L.Ed.2d 891 (1984); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

SUMMARY OF ARGUMENT

Certiorari should be granted because of the deleterious impact of the decision below on the private enforcement of the civil rights laws. The decision's mechanical equation of an attorney's billing rate with his or her market rate would penalize attorneys who are willing to take on civil rights cases at reduced fees. It would particularly affect those firms which have public interest litigation as a major portion of their practice. The decision is in conflict with this Court's decision in Blum v. Stenson, ___ U.S. ___, 79 L.Ed.2d 891 (1984), with the decisions of other circuits, and with the

intent of Congress when it enacted the various civil rights fees statutes.

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THE CASE RAISES ISSUES OF CRUCIAL IMPORTANCE TO THE PRIVATE ENFORCEMENT OF THE CIVIL RIGHTS LAWS.

As explained in the statement of interest, the NAACP Legal Defense Fund, in common with other national public interest lititation organizations, depends heavily on the efforts of attorneys in private practice for the carrying out of its program. Thus, although the decision below, which holds that attorneys employed by public interest organizations can receive a full market rate, would not affect the fees recovered by the Fund itself, it would have a devastating effect on the Fund's ability to enlist private attorneys to carry out its mission of

providing legal assistance to persons unable to pay attorneys' fees. This result follows from the decision of the court below on both the issue of computation of the lodestar rate and the issue of the allowance of a contingency adjustment to take account of the risks of such litigation.

The impact of the decision below has already been felt in the District of Columbia. To amicus' knowledge the number of attorneys in small and single practitioner firms who can continue to take on the representation of the average civil rights plaintiff has been seriously affected by the Laffey decision. Attorneys have been forced to restrict their civil rights practice to those few clients who can afford to pay a full market rate. They are economically unable to continue

their prior practice of billing civil rights clients either not at all or at a reduced rate, since under the decision below such practices would establish what they may receive by a court.

We urge that the petition for a writ of certiorari should be granted because the decision of the court below is fundamentally inconsistent with the decision of this Court in Blum v. Stenson, ____ U.S. _____, 79 L.Ed.2d 891 (1984), with the decisions of virtually every other court of appeals, and with the legislative history and purposes of the various civil rights attorneys' fees statutes.

The decision below would establish two categories of civil rights practitioners, one favored and one disfavored. The favored category would consist of

firms with high billing rates and clients able to afford those rates and public interest organizations, which would be able to use the same high billing rates to establish the market value of their attorneys' work since they have no billing practices of their own. The disfavored category would consist of the firms that handle the bulk of civil rights cases, particularly individual employment discrimination cases on behalf of single employees.

Firms engaged in active civil rights practice, with whom amicus works throughout the country, must of necessity charge their clients less than a fair market rate because the ordinary plaintiff, even one with an income in the mid-ranges, simply cannot afford to pay fees at market rates. Take, for example, a Title VII plaintiff

challenging illegal discrimination in the form of the denial of a promotion with a case that must go through the administrative process and trial in district court in order to obtain full injunctive and back pay relief. Such litigation can easily result in attorneys' fee in excess of $50,000. Given the risk of losing, it would simply not make economic sense for such a plaintiff to pay an attorney at a full market rate.

Thus, it is common for attorneys who have regular civil rights practices to represent clients at no charge at all or to bill out at a rate substantially lower than that they could receive from the market in other types of cases. The remainder of the fee is contingent on success at trial. Hence, to equate the attorney's <u>billing</u> rate with his or her

market rate is simply wrong. To do so, moreover, imposes a penalty of the severest kind upon attorneys willing to risk receiving little or no fees in order to do precisely what Congress intended, viz., represent persons who otherwise would be financially unable to pursue their civil rights claims.

Even when a firm has a substantial commercial practice the mechanical equation of its billing rates in that type of case with a proper market rate for contingent-fee, complex federal litigation is inaccurate. In the ordinary commercial practice a firm will bill out and get paid on a current basis regardless of the outcome of the litigation. Consequently, those billing rates will not provide adequate compensation for contingent fee litigation, for they do "not take into

account the loss in value of money because of inflation or the loss of the use of the money because of delay in payment."[1] As the Fifth Circuit has succinctly put it:

> Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result. This is neither less nor more appropriate in civil rights litigation than in personal injury cases. The standard of compensation must enable counsel to accept apparently just causes without awaiting sure winners.

Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc).

Again, the purpose of the fees acts -- to encourage attorneys to take on these complex and lengthy cases -- must control. If effective rates in commercial litigation are higher because fees are received

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[1] "Counsel Fees in Public Interest Litigation", Report of the Committee on Legal Assistance, 39 The Record of the Association of the Bar of the City of New York 300, 318 (1984).

on time and without risk, "there will be a negative incentive to move away from civil rights litigation and to concentrate efforts on more profitable aspects of the practice."[2] See Vulcan Soc'y v. Fire Department, 533 F. Supp. 1054, 1066 (S.D.N.Y. 1982).

Blum v. Stenson, supra, and the decisions from the other circuits discussed in the petition at pp. 18-19, are inconsistent with the result the court below reaches. Those decisions simply state the proposition that billing rates can provide a convenient starting point, and "may afford relevant comparisons" (79 L.Ed.2d at 900, n. 11 (emphasis added)). They do not hold that billing rates will

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[2] "Counsel Fees In Public Interest Litigation", op. cit. supra n. 2, p. 326. As the report notes, a number of district courts, as well as the Association of the Bar itself, have found it necessary to establish special programs to encourage the private bar to take on civil rights cases. Id. at 326-27. This is at the same time when the need for private enforcement has become all the greater. Id. at 324-26, and notes 171-175.

absolutely fix the amount to be awarded. As we have discussed above, unless the billing rates are for comparable, i.e., contingent and complex, litigation, and are equivalent to those that would be charged to clients financially able to pay the full amount on a monthly basis, they do not establish the market value of the attorneys' services simply because the attorney is with a for-profit firm.

In sum, the inevitable consequence of the decision below would either make it financially impossible for the great majority of civil rights plaintiffs to pursue their claims or would drive attorneys out of civil rights practice in even greater numbers than at present. Congress, however, intended to facilitate the creation of an expanding and active civil rights bar comparable to the bar

that eagerly takes on anti-trust and securities cases. See S. Rep. No. 94-1011 (94th Cong., 2d Sess., 1976), pp. 5-6.

The message sent by the decision below, however, is quite different than that intended by Congress.[3] It says to practitioners who are active in civil rights cases to stay away from such cases, except in the rare instance when they are lucky enough to find a client able to play a full fee every month, and to concentrate on representing regular commercial clients. Amicus can assure the Court that that message has been received and understood by the private bar; we urge in

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[3] In this regard, it is troubling that the decision below relies, in part, on a report to Congress of the National Association of Attorneys General, whose stated purpose is to convince Congress to amend the civil rights statutes to reduce the level of fees. 746 F.2d at 12. The NAAG report sets out a number of purported reasons why the fee statutes should be amended to produce lower fees. For a contrasting exposition of the present state of the law and a discussion of why it should not be changed we refer the Court to the recent report of the Association of the Bar of the City of New York cited in note 1, supra.

the strongest terms that review of the decision below is essential to prevent the private enforcement of the civil rights acts from being further undermined.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the decision of the court below should be reversed.

Respectfullly submitted,

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CLERK

No. 84-1655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARY P. LAFFEY, *et al.*,

Petitioners,

v.

NORTHWEST AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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May 1985

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QUESTIONS PRESENTED

In this case, in which the court of appeals reversed a fee award to a private, for-profit law firm that would have yielded the firm approximately four times the hourly rates that it charges its own regular, fee-paying clients, the questions are:

1. Did the court of appeals correctly hold that, in calculating a reasonable attorneys' fee award to a private, for-profit law firm that devotes 95% of its time to work for fee-paying clients, the district court should use the regular hourly rates the firm routinely charges those clients in similar types of litigation as presumptively indicating the market value of the firm's services?

2. Was it permissible for both courts below to rule that the circumstances of the case were not so "exceptional" as to justify awarding a 100% "quality multiplier" in addition to the "lodestar," when the courts found that (i) the quality of representation by plaintiffs' counsel was not superior to the representation that the firm normally provided to its regular, fee-paying clients and (ii) plaintiffs' counsel are to receive their full rates for their hours, two-thirds of which were logged by partners, and when the size of the recovery was the result of the size of the class and the length of the recovery period, not the result of any extraordinary achievement by plaintiffs' counsel?

3. Assuming that upward adjustments in fee awards may be granted in appropriate cases because of risk or "contingency," was it permissible for the court of appeals to determine that the risk found by the district court — that plaintiffs were at least as likely to win as to lose — was not so "unusual" as to warrant a 100% "contingency bonus"?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1655

MARY P. LAFFEY, *et al.*,

Petitioners,

v.

NORTHWEST AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Northwest Airlines, Inc., submits that this case does not warrant review by this Court.

STATEMENT

Petitioners' statement of facts is remarkable for what it does not contain. Nowhere do petitioners mention the amount of money that they requested as a "reasonable" attorneys' fee, the amount awarded by the district court, or the value of their award when calculated in accordance with the decision that they are now challenging. Although they leave the impression that they have been treated penuriously by the court of appeals, that court's approach will yield petitioners' counsel in excess of $1 million.

1. The Fee Application

In sum, petitioners' counsel sought over $5 million for about 11,000 attorney-hours on the merits of the litigation and for another 2,600 hours of attorney-time devoted exclusively to the fee litigation. In constructing what they viewed as a "reasonable" fee, they applied for "lodestar" hourly rates almost double those charged to the firm's own extensive array of regular, fee-paying clients. In addition, they asked for a 100% increase for the "quality of representation," and *another* 100% increase for the "risk" of nonsuccess. Using this approach, even though petitioners' lead counsel charged his own regular clients less than $100 an hour, he asked the district court to order the defendant to pay him as much as $525 per hour for his time in this case. The district court awarded over $3.5 million in fees and expenses, acceding to all of petitioners' requests except for the "quality" multiplier. Applying the principles that this Court and other circuits have settled, the court of appeals concluded that the district court's fee award was excessive.

The district court had determined in 1974 that petitioners were entitled to attorneys' fees. When petitioners' counsel filed their formal fee application in 1983, the only issue was the reasonable *amount* of the fee. Nevertheless, counsel filed what the district court termed "the most extensive fee application this Court has ever received" (App. 78a). As the court below found (App. 51a), the fee application spawned the sort of "second major litigation" that this Court repeatedly has admonished fee applicants to avoid. *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983); *Blum* v. *Stenson*, ___ U.S. ___, ___, 104 S. Ct. 1541, 1550 n.19 (1984). Petitioners' counsel, Bredhoff & Kaiser, specially engaged a second law firm, Arnold & Porter, to assist it in litigating the amount of attorneys' fees. As a result, "more attorneys worked on the fee request than ever worked on the merits" (App. 51a). Petitioners' initial fee application encompassed

five volumes, and included a 176-page memorandum of law, a 182-page affidavit of petitioners' lead counsel reciting the history of the litigation to the same district judge who had presided over the case, and 28 affidavits from other attorneys attesting to their own hourly rates, the significance of the underlying litigation, and the prestige of petitioners' counsel. The fee litigation also involved substantial discovery, including interrogatories, document requests, depositions, and, of course, the inevitable motions to compel.

In a little over a year, petitioners' counsel devoted over 4,300 professional hours — two and one-half person-years of attorney and paraprofessional time — to pursuing their fee. That extraordinary investment of time equalled 31% of the total number of professional hours that petitioners' counsel had devoted to the merits of the case over the prior 13 years; indeed, as the court of appeals remarked, the figure is greater than the number of hours that "were billed in any given year on the merits" (App. 51a). Not surprisingly, the court of appeals was "aghast at the hours devoted to the fee request" *(id.)*.

2. Hourly Rates

In this Court as in both courts below, petitioners' counsel have denied the relevance of their own billing rates by portraying themselves as representing "working people and non-profit clients" (Pet. 5). Although they attempt to cloak themselves in the mantle of public-interest lawyers, the record establishes that virtually all of the firm's regular clients are large, well-financed national labor unions and union pension funds, including the AFL-CIO, the United Steelworkers of America, the Oil, Chemical & Atomic Workers, and the Amalgamated Transit Union. The firm has represented those clients — as plaintiffs or defendants — in numerous employment discrimination cases, including, for example, *Franks* v. *Bowman Transportation Co.*, 424 U.S.

747 (1976); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982); and *Pullman-Standard Co.* v. *Swint*, 456 U.S. 273 (1982). In handling all of those cases, and in representing other institutional clients, the firm has adhered to a schedule of regular hourly rates. Dispelling any notion that the firm depends on contingent fee cases, the record establishes that the vast majority of the hours worked by all attorneys at the firm are billed to its institutional clients at regular hourly rates on a current basis and are paid in full.

Nevertheless, the district court disregarded the firm's normal rates and billing practices. The district court also ignored the uncontroverted evidence that the rates charged by petitioners' counsel are actually on the high end of rates (1) generally charged by union-oriented labor law firms and (2) awarded by courts in the District of Columbia to lawyers with comparable qualifications. Instead, in the belief that the rates the firm regularly charges in the marketplace do not reflect the "true value" of its professional services (App. 106a), the district court used lodestar rates almost double the rates the firm's regular clients pay.

On appeal, the court of appeals held that it was improper to award lodestar rates that bear no relation to the rates the firm actually charges its own clients (App. 41a). The court found that the district court "apparently *relied not at all* on the firm's normal billing rates" (App. 10a) (emphasis in original), or on any of the other evidence in the record, except the higher hourly rates charged by *other* firms which, according to petitioners' counsel, reflected the "true value" of their own services. The court of appeals concluded that the rates selected by the district court were "arbitrary" and were chosen with "no analysis of the market for legal services" and "no explanation as to why the Bredhoff & Kaiser attorneys were worth more in this case

than they were in similar cases litigated at the same time" (App. 31a).

The court of appeals reasoned that, under the approach that this Court took in *Blum* v. *Stenson, supra,* as well as its own precedents in *Copeland* v. *Marshall,* 641 F.2d 880 (D.C. Cir. 1980) (*en banc*), and *National Association of Concerned Veterans* v. *Secretary of Defense,* 675 F.2d 1319 (D.C. Cir. 1982), the "rates customarily charged" by a for-profit law firm "would presumptively stand as the reasonable rates" (App. 21a, 22a-25a). The court also noted, in accordance with economic evidence in the record, that using an attorney's customary billing rate in computing a fee award fulfills the twin statutory purposes of attracting competent counsel and awarding fully compensatory fees, because this approach provides the attorney with the "opportunity cost of foregone representations" (App. 27a), while avoiding the "windfalls to attorneys" that Congress cautioned against (App. 22a). In addition, the court viewed this approach as highly beneficial to the administration of justice, since it largely eliminates "the substantial costs of turning every attorneys fee case into a major ratemaking proceeding" (App. 40a), and since its predictability encourages settlement of attorneys' fee disputes (App. 33a-34a).

3. Quality Multiplier

The district court denied petitioners' application for a 100% bonus for the "quality" of counsel's performance. They suggest that the district court did so solely because their performance was "no more than the Court or Plaintiffs would demand of counsel" who charged the high hourly rates that the court used in calculating the lodestar (App. 114a). On the mistaken premise that this was the district court's only reason for denying a "quality" adjustment, petitioners assert that the court of appeals' subsequent decision reducing the lodestar rates to the firm's own

rates requires a countervailing "quality" increase, or at least a remand. In denying the requested multiplier, however, the district court also had relied on two other independent grounds. It found, first, that the case was not "exceptional" as that term has been defined in the relevant precedents (App. 115a). Second, the district court denied the premium because of "counsels' extensive reliance upon the skill and experience of highly-compensated partners," who were being compensated for that time at partner rates despite Northwest's objection that the firm's partner/associate staffing pattern in this case was unreasonably inefficient (App. 91a n.19; *see* App. 114a). [1]

On appeal, the court of appeals affirmed the decision not to award a quality multiplier, holding that under the standards that this Court enunciated in *Blum* v. *Stenson, supra,* the district court's finding that "the case . . . simply was not 'exceptional' " (App. 115a) precluded the award of a quality multiplier. The court also concluded that reducing the lodestar hourly rates did not warrant remanding the case to reexamine the request for a quality multiplier, since there was no "evidence that plaintiffs' counsel provided services that were 'superior' to those services provided at the firm's normal rates" (App. 41a-42a n.128).

4. Contingency Multiplier

Petitioners' counsel also requested a separate 100% bonus for contingency, the "risk of non-success." The district court granted the request. Since counsel's "receipt of fees depended on the successful termination of the litigation," the court believed that the firm was "*entitled*

1. Approximately 64 percent of the lawyer time logged during the merits phase of this case was expended by partners (App. 91a n.19).

to a risk adjustment," as a matter of law (App. 116a) (emphasis in original). In determining the size of the contingency bonus, the district court adopted the statistical model for calculating contingency multipliers proposed by petitioners: the appropriate multiplier is the reciprocal of the likelihood of success viewed *as of the outset of the litigation* (App. 119a-120a). Thus, in this case, where the district court found that the chances of winning or losing were equally likely, the court concluded that a doubling of the lodestar was necessary to compensate for risk.

In making that determination, the district court rejected as irrelevant the fact that counsel's risk had declined steadily over the course of the litigation. It was in 1973 that the district court had found various violations of Title VII and the Equal Pay Act, thus establishing that petitioners would be entitled to attorneys' fees. Then in 1975 Northwest chose not to appeal its liability on several Title VII issues, *see Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 437 n.10, 439 n.24 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), thereby assuring petitioners' counsel that they would receive a fee award to which "prevailing parties" are entitled. The level of contingency continued to decrease progressively in 1976, when the court of appeals affirmed the imposition of backpay liability; in 1977, when the court denied the petition for rehearing; and in 1978 when this Court denied Northwest's petition for certiorari. Indeed, approximately half of the "merits" hours for which petitioners' counsel have been awarded compensation were expended *after* the remand to the district court in 1978, during a phase of the litigation concerning the determination of the individual backpay awards. Thus, most of the hours for which compensation has been sought were spent by attorneys who were reasonably confident of payment,

and at least half of the time was spent when the attorneys were virtually certain to receive remuneration.[2]

Against this backdrop, the court of appeals reversed the award of a 100% contingency multiplier, holding that "the district court applied an erroneous legal standard when it assumed that plaintiffs' counsel were *'entitled'* to a contingency enhancement" (App. 50a) (emphasis in original). The court of appeals ruled that the mere fact that a lawyer litigates a case on a contingent-fee basis does not create an automatic entitlement to a contingency enhancement in every case. The court also rejected the approach urged by petitioners and accepted by the district court under which "the contingency multiplier represents simply the inverse of the risk factor," because (1) under those circumstances the risk multiplier would be highest when the defendant had the strongest case, thereby "creating a perverse penalty for the least culpable" and (2) "the chances of winning could not be set with anything approaching mathematical precision" (App. 45a).

The court of appeals then went on to consider petitioners' argument that the district court had actually awarded a contingency "enhancement" based on a "more sophisticated analysis" that considered "not only . . . the initial outlook for success, but also . . . the magnitude of what was placed at risk" (App. 48a). The court of appeals noted that in *Blum* this Court had cast doubt on the propriety of any

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2. In addition, petitioners' counsel have not incurred many of the large expense items frequently associated with class action litigation. For example, Northwest bore some of the cost of providing notices to class members. Northwest also furnished air transportation to plaintiffs and their attorneys during the pre-trial and trial stages of the litigation. During the remedial stages of the litigation, Northwest personnel performed the backpay and other calculations necessary to implement the remedy and paid the expert hired by petitioners' counsel to audit those calculations.

contingency enhancements, because the Court expressly reserved the question "whether the risk of not being the prevailing party . . . may ever justify an upward fee adjustment." 104 S.Ct. at 1550 n.17. The court of appeals, nevertheless, assumed that courts may grant such enhancements in appropriate, "exceptional" cases (App. 49a) (quoting *Blum* and *Hensley*). The court concluded, however, that the facts of this case as found by the district court do not warrant a contingency enhancement. Since even at the outset plaintiffs were at least as likely to succeed as not, and even that prospect of ultimately obtaining fees increased as the case wore on, the case simply did not present an "unusual" level of risk:

> "Regardless whether contingency enhancements are ever warranted, it is clear in this case that a showing sufficient to qualify plaintiffs' counsel for an enhancement cannot be made" (App. 49a).

Petitioners' counsel then sought certiorari.

REASONS FOR DENYING THE WRIT

None of the questions raised in the petition warrants further review.

I. THE HOLDING THAT A REASONABLE ATTORNEYS' FEE TO A PRIVATE, FOR-PROFIT LAW FIRM SHOULD BE PRESUMPTIVELY BASED ON THE FIRM'S REGULAR HOURLY RATES RAISES NO NOVEL ISSUE AND IS CONSISTENT WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS.

While the case was pending in the court of appeals, this Court decided in *Blum* v. *Stenson, supra,* that attorneys'

fees awarded under fee-shifting statutes are to be based on the "prevailing market rate" for the lawyer's services. The court of appeals, therefore, viewed its "rather narrow task" as determining whether the district court had correctly ascertained the "reasonable market rate" for the services of petitioners' counsel (App. 18a). The court soundly held that the reasonable hourly rates for attorneys in a private, for-profit law firm must be presumptively based upon the rates that firm actually commands in the marketplace for legal services: "[t]he marketplace best measures 'market value'; appraisal by no other method has as much claim to veracity and objectivity" (App. 28a). That holding is consistent with this Court's precedents, Congress's intent as expressed in the Civil Rights Attorney's Fees Awards Act, and the decisions of the circuits.

Petitioners actually concede that "in many cases — perhaps most — the billing rates of a private, for-profit lawyer are an accurate reflection of, indeed are a direct function of, the prevailing market value of that lawyer's services" (Pet. at 15 n.10). Petitioners thus admit that the general principle recognized in the decision below is correct; their quarrel is simply with the application of that principle to this case. Since it is undisputed that petitioners' counsel are "private, for-profit" lawyers, petitioners are asking this Court to decide whether the court below should have excepted a particular law firm from an admittedly correct general principle. That is not an issue worthy of this Court's review.

A. The Decision Below Is Consistent With This Court's Precedents.

In an effort to suggest that some broader question is at stake, petitioners assert that the decision below is philosophically inconsistent with this Court's ruling in *Blum* v. *Stenson, supra*. In *Blum*, the Court simply held that non-profit

legal service organizations are to receive attorneys' fees based upon "prevailing market rates," rather than on the "costs" of providing the services. 104 S.Ct. at 1547. The Court thus ruled that the *basis* for a fee award should not turn on the form of organization through which the plaintiff obtains legal services. In every case, the market-oriented "lodestar" approach is to be used, so that the fee represents the product of a reasonable hourly rate multiplied by a reasonable number of hours.

The issue in the present case is a mechanical one: Did the court below select the most reliable indicator of the reasonable market rate for a particular lawyer? The Court did not hold in *Blum*, as petitioners imply, that the *rates* to be awarded to all attorneys of a given level of experience and skill in a community ought to be identical. On the contrary, the Court explained the economic underpinnings of the term "prevailing market rate" in terms that preclude that conclusion:

> "Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively — even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely." (*Id.* at 1547 n.11)

Applying the economic analysis set forth in *Blum*, the court of appeals here soundly recognized that, "[f]or private law firms, the prevailing market rate for the firm's services is

presumptively found in the firm's customary billing rates" (App. 39a-40a) (emphasis added). The court reasoned that

> "when fixed market rates already exist [for the petitioning firm or lawyers within the firm], there is no good reason to tolerate the substantial costs of turning every attorneys fee case into a major ratemaking proceeding. *In almost every case, the firms' established billing rates will provide fair compensation.* The established rates represent the opportunity cost of what the firm turned away in order to take the litigation; they represent the lawyers' own assessment of the value of their time" (App. 40a) (emphasis in the original).

That approach, which petitioners concede is appropriate in "many cases — perhaps most" (Pet. at 15 n.10), is in accord with the legislative purpose, reiterated in *Blum*, that:

> "A 'reasonable attorneys' fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys' " 104 S. Ct. at 1548 (quoting S. Rep. No. 1011, 94th Cong; 2d Sess. 6 (1976). *See* App. 20a-23a.

As the court of appeals also observed, determining the appropriate hourly rates to award to a private, for-profit lawyer based upon the lawyer's "opportunity cost" simply "reaffirms" the Circuit's "past practice" (App. 35a) in *Copeland* v. *Marshall, supra*, and other cases, *e.g.*, *National Association of Concerned Veterans* v. *Sec'y of Defense, supra*. In *Copeland*, for example, the *en banc* court had awarded a for-profit law firm its customary hourly rates for hours worked in a lengthy Title VII case, noting that the "prevailing hourly rate" for a fee applicant is his rate "established by the pressures of the market mechanism." 641 F.2d at 898 n.35.

In *Blum*, of course, it was necessary to construct a hypothetical "market rate" for the plaintiffs' lawyers, because as employees of a non-profit organization they had no market-tested hourly billing rates. Despite petitioners' assumption here, though, nothing in *Blum* requires a court to conduct such a costly, artificial valuation when the lawyer seeking a fee award practices with a private law firm that regularly bills its clients for his services at an established hourly rate. As the court of appeals found, that is the case here.

The ruling of the court of appeals also implements the policy that this Court expressed in *Blum* and *Hensley*, *supra*, that procedures for setting attorneys' fee awards must, if possible, avoid a "second major litigation." The court below found that the district court's "ratemaking" approach — which attempts to construct an attorney's "true value" regardless of his actual billing rate — necessarily entails "voluminous records, expert testimony, elaborate economic models, and so forth" and, as this case demonstrates, leads to huge expenditures of time and money in fee litigation. The court of appeals observed that presumptive reliance on established billing rates avoids complex and costly fee proceedings and encourages settlement, since the "combination of documented billable hours and a predictable hourly rate yields a projected lodestar figure that the parties can expect will withstand scrutiny" (App. 33a-35a).

B. The Opinion Below Raises No General Issue of Federal Law.

Petitioners attempt to leave the impression that the court below ruled that courts must use a private lawyer's own billing rate in *every* case. The court actually held, however, that district courts must begin "presumptively" with the private firm's own rates (App. 25a) and assume that, "*[i]n almost every case, the firm's established billing rates*

will provide fair compensation" as long as those rates "fall within the rates charged by other firms for similar work in the same community" (App. 40a, 41a) (emphasis in original). The court recognized, therefore, that there will be "unusual circumstances" (App. 40a) in which this presumption would not hold. For example, the court carefully noted that judicial "ratemaking" — *i.e.*, constructing a hypothetical rate based on other lawyer's fees — "must be tolerated" when "firms with no relevant billing histories are involved" (App. 40a). Thus, the opinion leaves ample room for fee applicants to show that their billing rates are not in fact market-tested.[3]

Petitioners, accordingly, are forced to argue that, even though the principle is sound and allows tailoring in specific cases, the court below reached the wrong result on the facts of this case. Such a fact-laden contention is hardly the appropriate subject of this Court's plenary attention. Nevertheless, we pause long enough to explain why the court of

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3. Amicus NAACP Legal Defense and Education Fund, Inc., like the petitioners, misunderstands the significance of the decision below, since the court did not hold, as the *amicus* fears, "that billing rates will absolutely fix the amount to be awarded" (Amicus brief at 12-13). To the contrary, the court below actually reaffirmed the principle that the courts must "construct" hourly rates "when calculating fee awards to attorneys or law firms *without* established billing practices" (App. 20a n.69) (emphasis in original), such as attorneys who are employed by or represent primarily public interest organizational clients.

Under the lower court's approach, if an attorney regularly discounts his customary billing rates for a specific type of litigation or takes only civil rights cases on a contingent fee basis, those would be important pieces of evidence for a court to consider in determining the "reasonable" rate for his services. That, however, is a far different situation from this case, where petitioners' counsel charge the same hourly rates for both employment discrimination litigation and other types of legal work.

appeals correctly rejected counsel's argument that their customary billing rates "do not reflect the market value of [their] services" (Pet. at 15).

Counsel assert that "where . . . a lawyer's established billing rates are a function of such *non-economic* factors as the choice to represent a particular clientele *that cannot afford to pay prevailing market rates*, that lawyer's billing rates do not reflect the value of his services on the open market" (Pet. at 16 n.10) (emphasis added). There are several reasons why this argument is unavailing here. First, the record belies its major premise, since the firm's clients are essentially large national labor unions whose treasuries surely enable them to pay fair rates. As the court below noted, even if counsel's clients "cannot afford *unlimited* legal fees," this situation "fails to distinguish them" from most clients in the market (App. 19a n.69) (emphasis added). Second, it is unsound to imply that, because counsel believe that their rates are "substantially below those prevailing in the District of Columbia" (Pet. at 5), they are charging all their own clients "reduced rates" that must be inflated when the opposing party must pay their fees (Pet. at 18).

Petitioners' argument mistakenly assumes, contrary to this Court's analysis in *Blum*, that there is a *single* "prevailing" market rate for attorneys. The argument is economically unsound; the market price for a good or service takes into account all factors of demand and supply, including the seller's subjective preferences. Moreover, the argument improperly presumes that the only theoretically "prevailing market rate" in a community is the premium rate charged by the most expensive law firms. In this case as in most others, counsel's customary rates actually do reflect a variety of market-related factors, including the extent of their clients' willingness to pay and the lawyers' willingness to provide services at those rates.

Therefore, it is hardly surprising that the court below rejected petitioners' arguments and held that the district judge had no legitimate reason to ignore the firm's established rates. In reaching that conclusion, the court relied on extensive evidence in the record that (1) the firm routinely charges its customary hourly rates to its regular clients both for prosecuting and for defending employment discrimination cases such as this one, (2) those rates are at the high end of the range of rates charged by labor law attorneys, and within the range of rates awarded to civil rights practitioners for similar litigation in the District, and (3) the firm's own clients believe, as one had independently testified in another proceeding, that the firm's customary rates "represented, in fact and in practice, the universally accepted measure of the fair value of services rendered" (Northwest Initial Submission, Exh. 27). The court's ruling, which is tied to the particular facts of this case, raises no issue of general importance.

In an effort to pique some interest in the fact-specific ruling below, petitioners conjure some "anomalies" that allegedly will result from the decision. For example, they imply that there is something odd about basing the reasonable hourly rate for an attorney's services on "the type of practice he has chosen to follow or of the type of clients he has chosen to represent in cases *other* than the one before the court" (Pet. at 17, emphasis in original). That outcome, however, is certainly no more unusual than the one they propose: compensating a lawyer for *his* time on the basis of *another* lawyer's type of practice.

Petitioners also discuss at length a hypothetical lawyer who must choose among three different career opportunities, but who may receive differing fee awards depending upon his choice (Pet. at 17-18). The supposed anomaly exists only if one ignores the flexibility that the court of appeals carefully built into its opinion. The court held that a

private lawyer's customary billing rate is the *presumptively* reasonable lodestar rate for his time in statutory fee cases, but only if his customary rate "falls within the [range of] rates charged by other firms for similar work" . . . (App. 40a-41a). Thus, the hypothetical attorney representing indigent clients would receive his customary hourly rate if it fell within the range of rates charged in the community. If it did not, a "constructed" award at a rate within that range would be permissible.

Similarly, nothing in the court's opinion suggests, as petitioners' hypothetical assumes, that the reasonable hourly rate constructed for a salaried lawyer employed by a non-profit legal services organization would be identical to the rate charged by a lawyer at the highest priced "corporate" law firm. The constructed rate in that situation would have to fall within the "range" of rates charged in the community for similar legal services. By the same token, even the "corporate" lawyer would not necessarily obtain his customary rate if it exceeds the range of rates charged in similar cases. *See Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 684 (N.D. Cal. 1974). Thus, the hypothetical presents no real anomalies, but simply illustrates that different inquiries are necessary in different contexts.

Finally, petitioners also suggest that it would be anomalous if they receive their customary hourly rates, because those rates may be lower than the rates awarded by the district court in *Blum* (Pet. at 18 n.11). There is, however, nothing "anomalous" in such an outcome. The reasonableness of the rates awarded to legal services attorneys by the district court in *Blum* was not controverted by specific evidence in the record. 104 S.Ct. at 1545. In this case, by contrast, the record is replete with evidence that the firm's customary rates actually reflect their market value. Under these circumstances, the real anomaly would be to require the defendant here to pay petitioners' counsel more for their

services to the petitioners than the firm charges its own regular clients for litigating similar cases.[4]

C. There Is No Circuit Conflict.

Petitioners also claim that the opinion below conflicts with the decisions of other circuits. They point directly to only two allegedly conflicting decisions in the Ninth Circuit; beyond the Ninth Circuit, they vaguely assert merely a conflict with "general principles announced" by several other circuits (Pet. at 19-20). In fact, there is no circuit conflict on the selection of appropriate hourly rates to be awarded to private law firms. The circuits that have addressed the question now uniformly agree that, in the

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4. In the court below, Northwest argued that, because petitioners' counsel utilized a disproportionate amount of partner time in the underlying litigation — 64% of all time devoted to the merits — the district court's use of large-firm hourly rates was doubly improper unless the court held counsel to large-firm staffing patterns (which evidence showed to be about 1/3 partner time and 2/3 associate time). Thus, Northwest challenged the district court's refusal to reallocate thousands of specifically identified hours expended by partners on such activities as basic legal research and initial drafting of pleadings and to compensate those hours only at associate rates.

The court of appeals noted that, "[i]f this court were to adopt the approach [to hourly rates] followed by the district court, there would be some merit to this argument" (App. 43a). But the court did not decide whether the requested reallocations should be made, because it remanded for a calculation of the lodestar based on counsel's own customary rates:

> *"[B]y deferring to the market we have obviated the need to set a 'true' staffing pattern to go along with a 'true value' set on the firm's services"* (App. 44a) (emphasis in original).

Thus, if this Court were to disagree with the court of appeals on selection of the reasonable hourly rates, the case would have to be sent back to the court of appeals for further proceedings on the staffing issue.

absence of unusual circumstances, the presumptively reasonable hourly rate for a private, for-profit attorney with a regular fee-paying clientele is his customary billing rate.[5]

Neither of the Ninth Circuit decisions on which petitioners principally rely even addresses this issue, so there is no basis to claim a conflict. In *White* v. *City of Richmond*, 559 F. Supp. 127, 130-31 (N.D. Cal. 1982), *aff'd*, 713 F.2d 458 (9th Cir. 1983), the district court constructed a reasonable hourly rate for the services of a lawyer employed by the NAACP and two private lawyers who generally represent plaintiffs in civil rights cases. 559 F. Supp. at 132 n.4. The Ninth Circuit affirmed the award even though the private lawyers had not submitted evidence about their bills to other clients. The court of appeals noted that "many civil rights practitioners," apparently including the private lawyers

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5. *See, e.g., Grendel's Den, Inc.* v. *Larkin*, 749 F.2d 945, 956 (1st Cir. 1984) (reducing rates awarded by the district court to the rate actually charged to other clients); *Cunningham* v. *City of McKeesport*, 753 F.2d 262, 267 (3d Cir. 1985) ("In the seminal *Lindy I* opinion this court held that the value of an attorney's time is generally reflected in his normal billing rate. Our premise was then, and still is, that the reasonable value of an attorney's time is the price that time normally commands in the marketplace"); *Wheeler* v. *Mental Health & Mental Retardation Authority*, 752 F.2d 1063, 1073 (5th Cir. 1985) ("Of the *Johnson* factors, the attorney's 'customary fee' is one that deserves special attention"); *Louisville Black Police Officers Org., Inc.* v. *City of Louisville*, 700 F.2d 268, 277 (6th Cir. 1983) ("[T]he marketplace normally sets a value for a private attorney's services"); *Henry* v. *Webermeier*, 738 F.2d 188, 195 (7th Cir. 1984) ("[T]he object of judicial fee determination is to simulate the results that would obtain if the lawyer were dealing with a paying client"); *Jorstad* v. *IDS Realty Trust*, 643 F.2d 1305, 1313 (8th Cir. 1981) (reducing hourly rates to amounts "more in line with the actual hourly rates charged by the attorneys involved"); *Ramos* v. *Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) ("If the lawyer seeking the fee is in private practice, his or her customary rate would be a relevant but not conclusive factor."); *Jones* v. *Central Soya Co.*, 748 F.2d 586, 593-94 n.16 (11th Cir. 1984) (affirming award of hourly rates based on those actually charged by plaintiff's attorney).

there, "do not bill their clients at an hourly commercial rate" and, therefore, it was "not an abuse of discretion in this type of case to use the reasonable community standard. . . . " 713 F.2d at 461. That approach is consistent with the principle recognized below that, "when calculating fee awards to attorneys or law firms *without* firmly established billing practices, the prevailing community rate for the services of lawyers of similar skill, experience, and reputation must be consulted" (App. 20a n.69) (emphasis in original). *See also* App. 26a.

Nor does the decision below conflict with *Manhart* v. *City of Los Angeles, Dept. of Water and Power*, 652 F.2d 904 (9th Cir. 1981), *vacated on other grounds*, 461 U.S. 951 (1983). The district court in *Manhart* had not used a lodestar analysis in awarding the attorneys' fee and had not specified what hourly rates it utilized in arriving at the fees awarded. *See* 652 F.2d at 907. The court of appeals nevertheless affirmed the award, holding that the district court had discretion to award a "reasonable" fee without using a lodestar "formula." 652 F.2d at 908. That free-wheeling approach, of course, cannot survive this Court's subsequent decisions in *Blum* and *Hensley*, so the case is of little force in any event. Petitioners focus on the comment that the "award also cannot be deemed excessive because it allowed a higher fee than set by the agreement between the union and its attorneys." 652 F.2d at 909. Nothing in either court's opinion, however, indicates anything about the nature of the agreement between the union and its attorneys, or about the attorneys' other billing practices, thus making it impossible to penetrate the basis for the fee award or to conclude that it conflicts with the holding below.

Furthermore, in other cases the Ninth Circuit has approved the use of a private law firm's regular hourly rates in computing the lodestar in Title VII cases. *E.g.*, *Thornberry* v. *Delta Air Lines, Inc.*, 25 EPD ¶ 13,495 (N.D.

Cal. 1980), *aff'd*, 676 F.2d 1240, 1243 (9th Cir. 1982), *vacated and remanded for reconsideration of other issue*, 461 U.S. 952 (1983) (awarding prevailing plaintiffs' attorneys their normal "billing rates"). And in *Stanford Daily* v. *Zurcher, supra*, one of the cases endorsed in the legislative history of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, *see Blum* v. *Stenson, supra*, 104 S. Ct. at 1546, the court awarded private lawyers rates in line with their "individual billing rates," 64 F.R.D. at 684. Thus, the decision below is well in line with other decisions throughout the country.

II. THE REFUSAL TO REMAND FOR RECONSIDERATION OF A QUALITY MULTIPLIER RAISES NO IMPORTANT ISSUE.

In *Blum* v. *Stenson, supra*, which was decided between the decisions of the district court and of the court of appeals, this Court articulated the test for quality multipliers:

> "The 'quality of representation' . . . may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' " 104 S. Ct. at 1549.

In denying the petitioners' request for a 100% bonus for the quality of representation, the district court did not have the benefit of this Court's guidance in *Blum*. The court of appeals, however, assessed the record in light of the standard set out in *Blum* and concluded that "there simply was no specific evidence that plaintiffs' counsel provided services that were 'superior' to those services provided at the firms' normal rates" (App. 42a n.128). Thus, the court of appeals found that petitioners had not satisfied the first of the two prongs of the *Blum* test.

The court of appeals also noted that the district court had specifically found against petitioners on the second prong when the court determined that this case "simply was not 'exceptional' as that term has been defined" by other decisions (App. 42a n.128). Petitioners imply (Pet. at 21 n.14) that the district court premised its adverse finding *solely* on the caliber of representation expected of those who command the high hourly rates that the court originally awarded. In addition, however, the district court found that the results were not "exceptional" because the "results obtained in this case also are consistent with the . . . number of hours devoted to the case" (App. 114a) — over 11,000 on the merits alone — and with the partner-heavy staffing pattern used by plaintiffs' counsel (almost 65% of the time expended was by more highly compensated partners). Moreover, the size of the judgment, which counsel emphasize in trying to justify their request for a quality multiplier, was simply the result of the size of the plaintiff class and the length of the recovery period, two phenomena for which petitioners' counsel can claim little credit. The court of appeals thus found that, on this record, petitioners had not met the second requirement of the *Blum* test either.

In these circumstances, where the district court's findings indicate that petitioners have not proven and could not prove either element of the *Blum* test, the court of appeals found that the record allowed it to decide that it is unnecessary to remand the case to reconsider the denial of a quality multiplier. That decision raises no significant issue. Petitioners have not even alleged any conflict with the decisions of this Court or other circuits on this fact-specific issue, nor could they.

III. THE REVERSAL OF A 100% CONTINGENCY MULTIPLIER RAISES NO IMPORTANT ISSUE AND IS CONSISTENT WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS.

Petitioners attempt to manufacture a circuit conflict by characterizing the decision below as effectively holding that contingency bonuses are never permissible. The court of appeals, however, did *not* so hold. While acknowledging that this Court in *Blum* questioned whether Congress has authorized contingency multipliers under fee-shifting statutes, the court below expressly assumed that such adjustments may be permissible in appropriate cases. That assumption *arguendo* poses no conflict with any other decision. The court then merely held that the district court's findings were inadequate to justify a 100% contingency premium in this case.

In reaching that conclusion, the court rested on three unexceptionable rulings. First, the court held that "the district court applied an erroneous legal standard when it assumed that plaintiffs' counsel were *'entitled'* to a contingency enhancement" (App. 50a). In ruling that fee applicants are not *automatically* entitled to a contingency bonus, the court below was reiterating a principle necessarily established in this Court's intervening decision in *Blum* v. *Stenson, supra*. The Court there reversed a risk multiplier awarded to counsel whose fees were entirely contingent upon the success of the litigation. 104 S. Ct. at 1550. Although the Court did not decide whether and when such multipliers *may* be awarded, the unavoidable import of the outright reversal of the contingency multiplier in *Blum* is that mere contingency of the fee is not enough to establish *entitlement* to a risk multiplier. Every circuit that has faced the question since this Court's decisions in *Hensley* and

Blum has rejected any notion of entitlement to risk premiums.[6]

Second, the court of appeals ruled that, like any upward adjustment in the lodestar, any contingency "enhancements" could only be appropriate "in an exceptional case" (App. 49a). This ruling, too, simply applies the test that this Court expressly articulated in *Hensley* and *Blum*. *See* App. 49a.

Third, the court of appeals held that the nature and extent of the risk of non-compensation were not serious enough to warrant doubling the lodestar for "contingency."[7] The district judge had justified a 100% contingency premium because he found that, at the outset of the case, the petitioners had a 50-50 chance of prevailing. The court of appeals quite reasonably ruled that a 50% chance of winning "reflects the norm for litigated cases" and thus that the

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6. *See, e.g., McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984) ("In this circuit, the risk of losing *'alone* does not justify the use of a multiplier' ") (emphasis added); *Carmichael* v. *Birmingham Saw Works*, 738 F.2d 1126, 1138 (11th Cir. 1984) ("The law does not require 'that there must be enhancement in every case in which the fee is contingent' "); *Wheeler* v. *Mental Health & Mental Retardation Authority, supra*, 752 F.2d at 1073 ("A trial court is not required to enhance an award because of the contingent nature of the case."); *Hall* v. *Borough of Roselle*, 747 F.2d 838, 844 (3d Cir. 1984) (reversing contingency multiplier in contingent fee case); *Louisville Black Police Officers* v. *City of Louisville, supra*, 700 F.2d at 280 (district courts not required to award contingency multipliers).

7. Appellate courts carefully scrutinize contingency multipliers awarded by lower courts and reverse multipliers when the record does not justify them. *See, e.g., Blum* v. *Stenson, supra; Paschall* v. *Kansas City Star*, 695 F.2d 322, 338, *vacated on other grounds*, 727 F.2d 692 (8th Cir. 1982) (*en banc*), *cert. denied*, 105 S. Ct. 222 (1984); *Hall* v. *Borough of Roselle, supra; New York State Ass'n for Retarded Children* v. *Carey*, 711 F.2d 1136, 1154 (2d Cir. 1983); *City of Detroit* v. *Grinnell Corp.*, 560 F.2d 1093, 1102 (2d Cir. 1977); *Baughman* v. *Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1217-1219 (3d Cir. 1978).

"level of risk was not unusual in this case" (App. 50a-51a). (Indeed, plaintiffs actually prevail in far less than 50% of the civil cases filed; a lawyer who takes a contingent fee case that he has a 50% prospect of winning thus has an unusually high level of assurance.)

Furthermore, once the district judge had found liability in 1973, the risk of non-compensation diminished steadily and progressively as the case wore on; approximately half of the hours compensated by the district court for work on the merits were put in during the remedial phase of the litigation, when compensation was virtually assured. *See Ramos* v. *Lamm, supra*, 713 F.2d at 558 ("Once a case has been won in the district court, the risk of nonrecovery diminishes greatly"; a "contingency bonus should not be given for hours expended in the district court after remand"); *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624, 638 (6th Cir.), *cert. denied*, 447 U.S. 911 (1980) ("in a long and complicated lawsuit . . . only a portion of the time expended can be reasonably regarded as contingent").

The court of appeals thus concluded that, under these circumstances, "this case did not present an exceptional level of risk" and that "no risk enhancement should be awarded" (App. 51a). Petitioners' assertions about the "magnitude of what was placed at risk" are beside the point. This Court has firmly established that the "magnitude" of an attorney's efforts is reflected in the number of hours for which he is awarded compensation. *See Blum* v. *Stenson, supra*, 104 S. Ct. at 1548-49; *Donnell* v. *United States*, 682 F.2d 240, 253-54 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983). Since the decision below did no more than apply well established principles to the facts of this case, review of this issue is not warranted.

Finally, petitioners' counsel make much of the length of time that they have waited for payment of their fees. The

courts below, however, fully adjusted for any delay in payment by using current rates rather than historical rates for all hours credited, a technique approved by the courts for this purpose and actually requested in this case by petitioners. In any event, the complaint rings hollow in light of the litigation decisions that counsel have made. For instance, although Northwest was prepared in 1978 to address the calculation of attorneys' fees, petitioners' counsel asked the district court to defer that phase of the case until the completion of other proceedings on remand. *See* Order of April 14, 1978. As a result, the parties did not confront this question until several years later.[8] Petitioners' counsel, therefore, should not be heard to seek a "bonus" for the delays that they consciously chose to create.

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8. Furthermore, petitioners' counsel routinely sought extensions of time to file pleadings in this case. For example, petitioners did not file their pending petition for certiorari until seven months after the court of appeals filed its opinion. In almost every instance, including the motion for a two month extension to file their certiorari petition, petitioners explained that they needed those extensions in order to enable them to fulfill commitments to fee-paying clients in *other* cases. Although petitioners' counsel invariably sought extensions in this case, Northwest sought virtually none.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States
OCTOBER TERM, 1984

MARY P. LAFFEY, *et al.*,
Petitioners,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The issues in our petition are squarely presented, have widespread practical importance, and warrant this Court's consideration. Northwest's attempt to obfuscate these realities does not bear analysis, as we show herein. In addition, in a transparent effort to poison the atmosphere, Northwest proffers a number of irrelevant and grossly inaccurate assertions; we correct some of these in footnotes herein.[1]

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[1] Preliminarily, we address three of those assertions:

Northwest asserts that plaintiffs' counsel have not been "treated penuriously" by a decision that will yield them "in excess of $1 million" (Br. Op. 1). The result of the holding below has not yet been quantified, and doing so would not be easy, for plaintiffs' counsel did not have a "schedule" of fees (Br. Op. 4), but, rather, had widely-ranging fees reflecting the relative capacities of their clients to pay. That aside, the reasonableness of the total amount of the fee cannot be assessed in the abstract but must be judged in the light of the effort being compensated. Here, assuming that Northwest means to be saying that the decision below will yield in excess of $1 million in fees for litigating the merits, dividing that figure by 11,263 hours would yield an average hourly rate of less than $90 per hour, substantially below the rates upheld for very inexperienced lawyers in *Blum v. Stenson*, 104 S.Ct. 1541, 1544 n.4 (1984). And it is not clear that Northwest's $1 million figure is meant to be the yield just for those hours; Northwest may intend that figure to encompass hours spent litigating the fee issue, and even expenses, in which event the hourly rates would be less than $75 per hour.

Northwest suggests that, apart from denying a quality multiplier, the district court merely rubber-stamped plaintiffs' fee request (Br. Op. 2). In fact, the district court analyzed the fee application objectively and meticulously, and denied compensation altogether for 522 attorney hours and 520 paralegal hours for which compensation was sought (App. 87a, 96a-100a, 135a-137a); reduced the lodestar rate for one of plaintiffs' lawyers (App. 109a, n.37); reduced the rates for 35.5 hours worked by other lawyers (App. 91a); denied three of the four upward adjustments sought by plaintiffs: for exceptional performance (App. 113a-114a), exceptional results (App. 114a), and delay in receipt of payment (App.

1. *Lodestar Rates.* The first question presented is whether lawyers in a given community of the same skill, experience and reputation are to receive the same lodestar rate when they represent prevailing plaintiffs in civil rights cases, or whether the lodestar rate is to vary depending upon the nature of the clientele the lawyers have chosen to represent in the *remainder* of their practice. Several circuits have held the former (Pet. 18-19; *infra* at 5); the court below the latter. These different answers reflect a fundamental dispute over what Congress intended when it enacted the civil rights fee statutes—a dispute that warrants this Court's attention.

The issue is squarely presented by this case. The district court found (and the court of appeals did not dispute) that the prevailing market rates in the community charged to fee-paying clients by lawyers of the skill, experience and reputation of plaintiffs' counsel are the

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120a-123a); and denied reimbursement of over $25,000 of plaintiffs' litigation expenses (App. 128a-132a).

Northwest's brief contains a lengthy recital of the supposed excesses of plaintiffs' counsel in the fee litigation. In fact, the district court found that plaintiffs' counsel had reasonably expended 2106 hours litigating fees (App. 101a)—out of 2579 sought (App. 92a)—and the court of appeals affirmed that finding (App. 51a-52a). As the district court explained, the high number of hours was the product of two phenomena: the extensive documentation requirements imposed upon fee claimants by the courts (requirements that were particularly time-consuming in this case given the scope and length of the litigation (App. 100a)), and, most importantly, the manner in which *Northwest* chose to defend the fee claim: "Defendant has approached this fee petition with an intensity and vigor even greater than that which characterized its litigation strategy on the merits" (App. 139a). Plaintiffs' merely "responded" to a litigation course dictated by Northwest (App. 100a). For example, nearly one-fifth of all the compensated hours were spent responding to Northwest's massive discovery requests (App. 98a). Northwest asserts that "more attorneys worked on the fee request than ever worked on the merits" (Br. Op. 2). The sole activity for several of those attorneys was compiling the information demanded in Northwest's discovery requests respecting their personal role in litigating the merits.

rates reflected in the matrix of lodestar rates the district court adopted (App. 103a).[2] The district court further found (and again the court of appeals did not dispute) that the reason plaintiffs' counsel do not in fact charge these rates to *their* fee-paying clients is not a reflection of the skill, experience and reputation of plaintiff's counsel but rather of "the particular clients the firm chooses to represent and their ability to pay" (App. 103a). Accepting these premises, the court below held nonetheless that plaintiffs' counsel are remitted to their lower rates—rates which are *not* "the prevailing market rates in the relevant community" (*Blum v. Stenson*, 104 S.Ct. 1541, 1547).

Northwest's suggestion that the issue is one of limited importance is wrong. There are numerous highly qualified lawyers in private practice who have chosen

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[2] Northwest states that the lodestar rates awarded by the district court are "almost double" those charged by plaintiffs' counsel to their fee-paying clients (Br. Op. 2). In the court below, Northwest provided a more accurate assessement, showing that the district court's lodestar exceeded by 46% the lodestar proposed by Northwest on the basis of plaintiffs' counsel's billing rates. Brief for Northwest in Court of Appeals, p. 19.

Northwest asserts that the lodestar rates adopted by the district court were "large-firm . . . rates," charged by firms that use different "staffing patterns" than here, including a greater reliance on associate (as compared to partner) time (Br. Op. 18, n.4). But the record showed without contradiction that small and medium size firms whose lawyers have the same skill and reputation also charge the rates adopted by the district court, including firms whose partner-associate ratios are far more heavily skewed to partners than is true of plaintiffs' counsel's firm. Moreover, the district court found that in appropriate circumstances large firms adopt the same litigation staffing patterns as here (App. 90a, n.18), and concluded that "[i]n light of the complexity of the case, the novelty of the issues raised, and the caliber and tenacity of the defense, . . . the Court does not find this allocation of tasks either surprising or inappropriate" (App. 91a, n.19).

careers representing labor unions, individual working people, civil rights groups, environmental organizations, and other clients at rates below those they could command if they chose to represent a more affluent clientele; these lawyers frequently undertake the representation of plaintiffs in civil rights cases. The opinion below would fix the lodestar rates for all such lawyers at the rates charged to their regular clientele, even though those rates do not reflect the skill, experience, and reputation of the lawyers.[3] Thus, the *amicus curiae* has a far more accurate perception than Northwest of the significance of the holding below.

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[3] Northwest attempts to depict the opinion below as "fact-specific," and as not dispositive of the fate of other lawyers whose rates, because of the nature of the lawyers' clientele, are below the prevailing market rates for lawyers of comparable skill, experience, and reputation (Br. Op. 13-17). But the opinion does not admit of such an interpretation. The opinion below would control the determination of lodestar rates for *all* lawyers who represent labor unions, working people, civil rights groups, environmental organizations and other similar clients at rates below what they would command from a more affluent clientele. Indeed, the court below perceived itself to be issuing a ruling of general application. See App. 18a-36a.

Northwest seizes on the word "presumptively" and the concept of "bracketing" in the opinion below, stating that "[t]he court held that a private lawyer's customary billing rate is the *presumptively* reasonable lodestar rate for his time in statutory fee cases, but only if his customary rate 'falls within the [range of] rates charged by other firms for similar work.' " Br. Op. at 16-17 (quoting App. 41a) (emphasis and brackets in original). But, this "qualification" of the ruling below does not somehow alter the issue here or make it "fact-specific." Under the court's bracketing concept, a fee applicant whose regular billing rates are found, as here, not to reflect his or her skill, experience, and reputation, will nevertheless be restricted to those billing rates in the calculation of fee awards whenever there are other lawyers who, because of the nature of their clientele, also charge fee-paying clients less than those lawyers could command based on their skill, experience and reputation—a situation which prevails wherever there are private lawyers representing unions, civil rights or environmental groups, or similar types of clients.

In addition to the cases cited in the petition, another recently-published Circuit decision conflicts with the holding below on this issue. *Garrity v. Sununu*, 752 F.2d 727, 739-40 (1st Cir. 1984). In that case, the district court, ruling before this Court's decision in *Blum*, had fixed the lodestar rates at the attorneys' own "average hourly [billing] rates", but had then awarded 20% "bonuses" to account for the fact that the attorneys' own rates were below those prevailing in the community for lawyers of the same skill and experience. The First Circuit stated, 752 F.2d at 739-40:

> On the facts of this case, and taking into account that the lower court lacked the guidance of *Blum* at the time it ruled, we sustain the challenged upward adjustments even though we recognize that under *Blum* certain of the qualities sought to be recognized by the bonuses might better have been recognized by means of more adequate hourly rates.[4]

2. *Quality Adjustment.* Our contention—that if lawyers who choose to represent a particular clientele at rates below those they could otherwise command in the marketplace are consequently to have their lodestar rates held down, then a quality adjustment is permissible—is plainly supported by the First Circuit's holding in *Garrity*, quoted *supra*, and that decision is in conflict with the holding of the court below on this point.[5]

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[4] That Circuit's prior opinion in *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 956 (1st Cir. 1984), cited by Northwest (Br. Op. 19, n.5), is not to the contrary. In *Grendel's Den*, the court indeed reduced a lodestar hourly rate, as Northwest says, "to the rate actually charged to other clients" (Br. Op. 19, n.5)—$175 per hour. But the court did so only after determining that those other clients "were major institutions which could afford to pay top dollar," 749 F.2d at 956.

[5] Northwest has misrepresented the holding below, by suggesting that one of the reasons a remand was not allowed to permit reconsideration by the district court of a quality adjustment was the district court's observation respecting the percentage of partner time devoted to this case (Br. Op. 22). The court of appeals did not mention that factor in its ruling (App. 41a-42a, n.128), and

3. *Contingency Adjustment.* The court below ruled that a district court is without discretion to award a contingency adjustment in a massive class action brought with a 50% chance of non-recovery. In an effort to obscure the obvious importance of the issue posed by that ruling, Northwest grossly mischaracterizes the holding below: "The court . . . merely held that the district court's findings were inadequate to justify a 100% contingency premium in this case" (Br. Op. 23; see also *id.* at i, question 3). What the court below held is *not* that a 100% adjustment was excessive, but that "*no* risk enhancement should be awarded" (App. 51a, emphasis added; see also *id.* 54a).

Thus, two of the points made by Northwest with regard to the issue of the risk adjustment are beside the point, as well as inaccurate. The court below did not simply hold that the district court applied the wrong legal standard in assuming that "plaintiffs' counsel were '*entitled*' to a contingency adjustment" (Br. Op. 23). Had that been the limit of the appellate court's ruling, the risk issue would have been remanded to the district court. Rather, as just stated, the court held that the district court was *not permitted* to award *any* risk adjustment.

Similarly, Northwest's attempted demonstration (Br. Op. 7-8, 24-25) that the risk in this case declined over time does not bear on the question whether the court

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for a good reason: the district court's observation had related to a different issue. Under D.C. Circuit law at the time the district court ruled, quality adjustments could be awarded for either of two reasons: to reflect exceptional *performance* (*i.e.*, performance of a quality exceeding that expected of a lawyer commanding the lodestar rates used) or exceptional *results* (litigating the case in fewer hours than would have been expected to achieve the results obtained). *See* App. 112a-113a. The district court had denied a quality adjustment for exceptional *performance*—the only claim at issue here—for the reasons stated in our petition (App. 113a-114a). The district court had cited the percentage of partner time only as a reason for denying an adjustment for exceptional *results* (App. 114a).

below was correct in ruling that the district court was without discretion to award any risk adjustment. Contrary to Northwest's erroneous assertions (Br. Op. 9, 25), the supposed declining risk was not relied upon at all by the court below in reaching its conclusion that "no risk enhancement should be awarded." [6]

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[6] Given its irrelevancy to the issue presented, we note only briefly that Northwest's "declining risk" argument is flawed both legally and factually. As a matter of law, the prevailing view is that the risk is to be assessed as of the time that the litigation was undertaken by the lawyer, for it is at that time that the attorney must evaluate the risk of failure and determine whether the case is worth pursuing as an economic matter. Once the lawyer commits himself to the case he is obliged to devote all efforts necessary to pursue diligently all reasonable claims regardless whether the risk thereafter increases or decreases. Berger, *Court Awarded Attorneys' Fees: What Is Reasonable?*, 126 U. Pa. L. Rev. 281, 324-26 (1977). *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 448-49 (Opinion of Justice Brennan, concurring in part and dissenting in part, joined by Justices Marshall, Blackmun and Stevens); *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (*en banc*); *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983); *Hall v. Borough of Roselle*, 747 F.2d 838, 843 (3rd Cir. 1984).

And, as a matter of fact, every hour worked in this case was at risk at the time it was worked. It was not until the denial of certiorari on the merits *this year* in No. 84-825 that Northwest's efforts to escape the major liability findings were finally put to rest. Between 1978 (when Northwest's earlier petition for certiorari was denied) and 1985, the bulk of the time of plaintiffs' counsel was devoted to defending against Northwest's efforts to escape the liability findings on the basis of allegedly supervening decisions of this Court (App. 118a-119a, n.49); the remainder was devoted to litigating the appropriate remedies for the violations that Northwest was still seeking to overturn. To be sure, Northwest gave up the fight on a few minor issues in 1975, and as to the work done on those issues there was no longer a doubt that compensation would be forthcoming. But all work done on those issues was done *before* NWA gave up the fight, when there was a risk of not prevailing. That plaintiffs had prevailed on those issues did not mean that counsel would be compensated for the work thereafter done on the issues whose outcome still was in dispute. *Hensley v. Eckerhart, supra.*

Northwest's effort to characterize the holding below as fact-specific (Br. Op. 25) and of "no importan[ce]" (*id.* 23), because the opinion did not foreclose the possibility that there might be "exceptional" cases in which a contingency adjustment would be allowable, is doubly inaccurate. In the first place, the holding that contingency adjustments are available only in "exceptional" cases itself merits this Court's review. The only four Justices on this Court to address the question have declared precisely the opposite: "These factors are potentially relevant in every case." *Hensley v. Eckerhart*, 461 U.S. 424, 448-49 (1983) (Opinion of Justice Brennan, concurring in part and dissenting in part, joined by Justices Marshall, Blackmun, and Stevens, quoted more fully at Pet. 22-23). Not one of the opinions of the ten Circuits cited at Pet. 23, n.16 purports to limit contingency adjustments to "exceptional" cases. And, aside from the decision of the Seventh Circuit, the decisions cited by Northwest at Br. Op. 24, n.6, do not adopt such a limit; those decisions manifest that those courts would have affirmed the contingency adjustment awarded by the district court here.[7]

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[7] Thus, in *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1138 (11th Cir. 1984), the court stated: "When the attorney fee is contingent on success, the hourly rate should *ordinarily* be raised to compensate the attorney for the risk of non-recovery" (emphasis added). In *Hall v. Borough of Roselle*, 747 F.2d 838, 843 (3rd Cir. 1984), the court expressly adopted the position of Justice Brennan *et al.* (see Pet. 22-23), and the contingency adjustment was reversed in the particular case only because "from the very outset, liability of the defendants was clear." In *Louisville Black Police Officers v. City of Louisville*, 700 F.2d 268, 280 (6th Cir. 1983), the court *affirmed* a contingency adjustment, declaring that the decision whether to award one "is within the sound discretion of the district court" and noting that "a substantial upward adjustment to compensate for the risk" is warranted "in cases involving developing areas of law [and] in which the facts are strongly disputed." Only *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984), accords with the decision below, as we acknowledged at Pet. 23 & n.17.

Indeed, previously the D.C. Circuit itself had held that "a premium should *generally* be awarded if counsel would have obtained no fee in the event the suit was unsuccessful." *National Assn. of Concerned Veterans v. Sec. of Defense*, 675 F.2d 1319, 1323 (D.C. Cir. 1982) (emphasis added). But the decision below construes this Court's opinion in *Blum* to require abandonment of that position. App. 49a. Whether *Blum*—which said merely that the Court had "no occasion in this case to consider" the question (104 S.Ct. at 1550 n.17)—has been understood correctly by the court below to have answered the question (an understanding not shared by the dissent below, nor by any of the other post-*Blum* Circuit Court decisions cited at Pet. 23 n.16) deserves this Court's attention.

But even if the premise of the court below were accepted, and contingency adjustments were allowable only in "exceptional" cases, the holding below that massive class actions undertaken with a 50% risk of non-recovery are not "exceptional," and thus cannot warrant a contingency adjustment, would be of immense importance. It is precisely in massive litigation such as this that the availability of contingency adjustments is *most* important, for if such adjustments are not available qualified attorneys will be deterred from undertaking such litigation. *See, e.g., Craik v. Minnesota State University Bd.*, 738 F.2d 348, 350-51 (8th Cir. 1984); *Yates v. Mobile County Personnel Board*, 719 F.2d 1530, 1534 (11th Cir. 1983). As then-Professor Richard Posner explained, in an affidavit submitted in an antitrust case, it is "[b]ecause these are big cases" and therefore "the investment of the attorney's time and effort—an investment that he loses entirely if the suit is unsuccessful—is very large" that contingency adjustments are warranted, for in their absence attorneys would opt for "the more secure forms of practice." [8]

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[8] Affidavit of Prof. Posner in *Arenson v. Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974), quoted in *Phemister v. Harcourt Brace*

Indeed, the deterrent effect of the decision below is likely to be greater still, for in identifying the characteristics that render a case *not* "exceptional," the opinion has effectively left no room for *any* case to qualify for a contingency-adjustment. *See* Pet. 12, 21 n.15.[9]

Respectfully submitted,

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[9] Northwest attempts to lay on plaintiffs' counsel's doorstep the responsibility for the 15-year duration of this case (Br. Op. 26 and n.8). But as the district court has explained, that responsibility rests with Northwest, which "vigorously and unremittingly litigated every aspect of this case" (App. 118-119a, n.49), including three appeals on the merits and a seven-year effort to relitigate the basic liability rulings following the initial denial of certiorari in 1978 (*id.*). Northwest's suggestion that the parties commence fee negotiations in 1978 (Br. Op. 26)—a suggestion that if adopted would not have led to plaintiffs' counsel being paid at that time, but merely to fixing the amount to which they would become entitled if Northwest's efforts to overturn the liability rulings ultimately failed—was "rejected" by the district court (App. 77a, n.2; App. 123a, n.57), at plaintiffs' urging, for the dual reasons that there remained substantial merits litigation still to be conducted and plaintiffs' counsel would have confronted an arguable conflict of interest were they to negotiate their fees with Northwest at the same time they were litigating their clients' claims against Northwest. *Cf., Jeff D. v. Evans*, 743 F.2d 648, 651-52 (9th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3798-99 (May 14, 1985).